

Competition Act 1998

Decision of the Office of Fair Trading

No. CA98/01/2005

Collusive tendering for mastic asphalt flat-roofing contracts in Scotland

15 March 2005
(Case CE/1925-02)

SUMMARY

The Office of Fair Trading ('the OFT') has concluded that a number of roofing contractors, as listed in paragraph 1 of the Decision (each a 'Party', together 'the Parties'), colluded in relation to the making of tender bids in mastic asphalt flat roofing contracts in Scotland thereby infringing the Chapter I prohibition contained in section 2(1) of the Competition Act 1998 ('the Act').

The Parties were involved in individual agreements and/or concerted practices each of which had as its object the fixing of prices in the market for the supply of installation, repair, maintenance and improvement services for mastic asphalt coverings for flat roofs in Scotland. When a purchaser wished to purchase such services for a flat roof, it typically invited a number of suitably qualified contractors to submit tender bids detailing the price at which they could undertake the work specified in order to have competition for the individual contract between contractors and obtain a competitive price. The Parties' co-operation and co-ordination with each other in relation to the setting of tender prices had the object of preventing, restricting or distorting this competition. Different parties were involved in different numbers of contracts and the OFT has considered the collusion in relation to the tenders for each individual contract as discrete infringements.

The OFT considers that agreements and/or concerted practices between undertakings that fix prices by way of collusive tendering (or otherwise) are among the most serious infringements of the Act. Financial penalties are therefore being imposed on all Parties, subject to the operation of the policy to give lenient treatment for undertakings coming forward with information in cartel cases. In line with this policy Briggs Roofing & Cladding Limited has been granted 100 per cent leniency. In addition, Pirie Limited has been granted a reduction in fine by 55 per cent (which, in addition to a reduction in fine granted to it for its co-operation with this investigation, includes a further uplift in recognition of the fact that Pirie was the first party to apply for leniency and

voluntarily provide information in relation to a separate product market under the OFT's so-called 'leniency plus' policy), W G Walker & Company (Ayr) Limited by 45 per cent, and Lenaghan Roofing Services Limited by 35 per cent. The table in paragraph 439 below sets out the penalty for each Party.

Confidential information in the original version of this Decision has been redacted from the published version on the public register. Redacted confidential information in the text of the published version of the Decision is denoted by [...] **[C]** or by italic text in square brackets, e.g. *[more than 5 per cent]*.

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I. THE FACTS

A. The Parties

1. Information received by the OFT (see paragraph 43 below) indicated that the following companies (each a 'Party', together, the 'Parties'), described in more detail in paragraphs 2 to 21 below, engaged in price-fixing in relation to the supply of installation, repair, maintenance and improvement services for mastic asphalt coverings for flat roofs (and other flat surfaces) in Scotland:

- Briggs Roofing and Cladding Limited ('Briggs');
- Pirie (including Pirie Limited, Pirie Group Ltd and Pirie & Co (Paisley) Ltd) ('Pirie');
- W G Walker & Company (Ayr) Limited ('Walker'); and
- Lenaghan Roofing Services Limited ('Lenaghan').

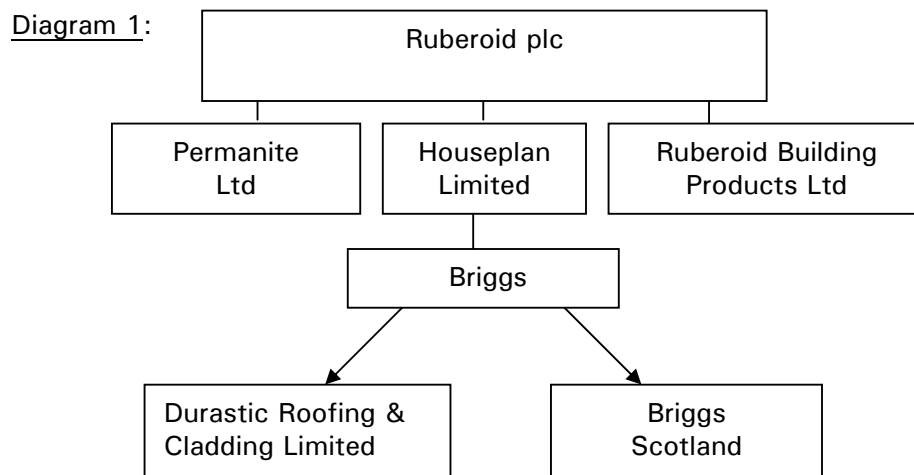
Briggs

2. Briggs is a private limited company that specialises in the provision of roofing services. Its immediate owners are the UK companies Houseplan Limited, an intermediate holding company, and Ruberoid Public Limited Company ('Ruberoid'), an intermediate parent company. Briggs' ultimate parent company is IKO Sales Limited ('IKO'), a Canadian company.¹ Briggs Scotland is Briggs' Scottish division and specialises in the supply of mastic asphalt coverings for flat roofs in Scotland. A senior Briggs employee is referred to in this Decision as Mr B, and a senior Ruberoid employee is referred to in this Decision as Mr E.²

¹ Directors' report and financial statements for Briggs for the year ended 31 December 2001. See also chart that Briggs provided to the OFT, showing the organisation of Ruberoid and related companies in the UK. This chart shows that Ruberoid owns Briggs and a number of other companies that form part of a group of roofing and cladding companies owned, ultimately, by IKO.

² Briggs' legal representatives, Hammond Suddards Edge made representations regarding the need for the identity of certain individuals to be anonymised. The OFT duly considered these representations and in the light of them - and having regard to the confidentiality provisions of sections 237, 238 and 241 of the Enterprise Act 2002 and to the particular circumstances of this case - the OFT has withheld the names of individuals within Briggs who provided direct evidence to the OFT in the form of interviews or witness statements.

3. The corporate structure of Briggs at the time of the infringements is summarised in simplified form in the diagram below:³



4. Durastic Roofing & Cladding Limited ('Durastic') was a subsidiary of Briggs. Prior to June 1998, before the infringements took place, the company was wound down, and the name *Durastic* became a trading style of Briggs. Potential customers continued to invite tender submissions from Durastic after 1998, however, the work where awarded to Durastic was actually undertaken by Briggs Scotland.⁴ For the purposes of this Decision all references to 'Briggs' and 'Durastic' by the other Parties, are references to Briggs Scotland, unless expressly stated otherwise. Three senior Briggs Scotland employees are referred to in this Decision as Mr A, Mr F and Mr K.⁵
5. Permanite Ltd ('Permanite') is a wholly-owned subsidiary of Ruberoid.⁶ Permanite describes itself as the "leading manufacturer of mastic asphalt and offers a complete range of roofing and flooring grade asphalt for all types of roofing, car parks, pavements and tanking situations".⁷ Permanite operates a nationwide approved contractor network.⁸ At the time of the infringements only four contractors based in Scotland were approved to install Permanite products:⁹ its own group company, Briggs Scotland/Durastic,¹⁰ and the other Parties in this Decision.

³ Ruberoid plc group structure, Competition Commission report 2001, Icopal Holding A/S and Icopal a/s: A report on the merger situation. See www.competition-commission.org.uk

⁴ See also explanation from Briggs' legal representatives, Hammond Suddards Edge, dated 8 November 2002.

⁵ See footnote 2.

⁶ See footnote 3 above.

⁷ See www.ruberoid.co.uk

⁸ *Ibid.*

⁹ Approved Contractor Agreement Status, provided by Briggs as part of Ruberoid's leniency application.

¹⁰ Durastic is a trading style of Briggs - see paragraph 4 above.

6. Although Briggs forms part of the economic entity ultimately controlled by Ruberoid, the infringements have been committed by Briggs and, therefore, the OFT considers that Briggs is the undertaking to which this Decision is directed and which the OFT considers to be a party to the infringement. In particular, the OFT is of the view that Briggs was aware of the collusive tendering activities of its Scottish division, Briggs Scotland from a statement provided by Mr A¹¹ (a senior manager of Briggs Scotland) who stated that he was aware of cover bids and that he let it carry on “as instructed by senior [Briggs] management.” In addition, Mr B¹² (a senior manager of Briggs) stated when asked about the collusive tendering activities by Briggs Scotland, “I was aware of it generally”. The OFT has no evidence to indicate that Ruberoid was aware of the collusive tendering practices undertaken by Briggs Scotland and its subsidiaries until Ruberoid undertook an internal investigation into these allegations in 2001, which subsequently led to Ruberoid making its formal leniency application to the OFT.
7. Briggs' registered address is: Hawthorne House, Halfords Lane, Smethwick, West Midlands B66 1BJ. Ruberoid's registered address is: Appley Lane North, Appley Bridge, Wigan, Lancashire, WN6 9AB. Prior to 16 December 2004 both companies were registered at: 14 Tewin Road, Welwyn Garden City, Hertfordshire AL7 1BP.
8. Ruberoid applied for, and was granted, conditional leniency in accordance with the OFT's leniency programme on behalf of itself and all its subsidiaries including Briggs.¹³ As part of Ruberoid's application for leniency, Briggs provided the OFT with a photocopy of the register of tenders in the form of a manuscript spreadsheet (the original no longer exists) ('the Register') that staff at Briggs Scotland kept, recording contracts which were subject to collusive tendering activities between 1993-2001. A number of the contracts detailed in the Register concerned roofing works in Scotland and this Decision deals with those contracts in relation to which the OFT considers there is sufficient evidence of infringement of the Chapter I prohibition.
9. Briggs' turnover for the calendar years 1999 and 2004 was as follows:¹⁴

- 1999	£33,530,000
- 2004	£29,607,000.

¹¹ See footnote 2.

¹² *Ibid.*

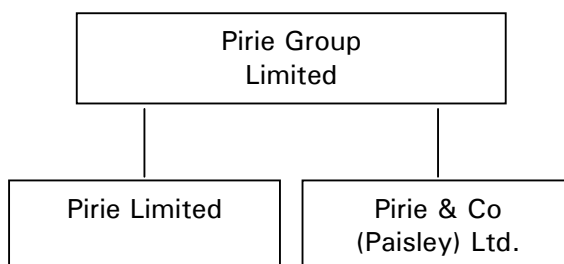
¹³ See 'Director General of Fair Trading's Guidance as to the Appropriate Amount of Penalty', Guideline OFT 423, which was in force at the time of the application, since replaced by the 'OFT's Guidance as to the appropriate amount of a penalty' (December 2004), paragraph 3.1 onwards.

¹⁴ Financial Analysis Made Easy ('FAME') Report for Briggs.

Pirie

10. Pirie is a private limited company whose principal activities concern road surfacing, civil engineering, flooring and roofing contracts.¹⁵ At the time of the infringements, Pirie's corporate structure was as follows:

Diagram 2:



11. Pirie Group Limited was purely a holding company at the time. In 2003 Pirie Group Limited was placed in members' voluntary liquidation.¹⁶ In January 2001 the mastic asphalt work undertaken by Pirie & Co (Paisley) Ltd. was transferred to Pirie Limited. The only company actively trading today is Pirie Limited.¹⁷ Its registered address is 82/84 New Sneddon Street, Paisley Renfrewshire PA3 2BG. Two estimators/surveyors of Pirie are referred to in this Decision as Mr D and Mr H.¹⁸
12. Pirie applied for, and was granted, conditional leniency in accordance with the OFT's leniency programme.¹⁹ As part of Pirie's application for leniency, Pirie provided the OFT with a memorandum prepared by Mr D, an estimator/surveyor of Pirie, sent to the OFT attached to a covering letter dated 2 December 2002.
13. Pirie's turnover for the calendar years 1999 and 2003 was as follows:²⁰

¹⁵ See latest filed report and financial statements for the year ending 31 December 2001.

¹⁶ By email dated 7 September 2004 addressed to the OFT, Pirie's counsel stated that for commercial reasons the company name was changed to M.O.W.E Ltd at some point before it was wound up.

¹⁷ The OFT notes that on 3 March 2005 a provisional liquidator was appointed in respect of Pirie Limited. This Decision is without prejudice to the OFT's position in relation to the possible liability of any successor of Pirie.

¹⁸ Pirie's legal representatives, MacRoberts, made representations regarding the need for the identity of certain individuals to be anonymised. The OFT duly considered these representations and in the light of them - and having regard to the confidentiality provisions of sections 237, 238 and 241 of the Enterprise Act 2002 and to the particular circumstances of this case - the OFT has withheld the names of individuals within Pirie who provided direct evidence to the OFT in the form of interviews or witness statements.

¹⁹ See footnote 13 above.

²⁰ Financial Analysis Made easy ('FAME') Report for Pirie for the years ended 31 December 1999 and 2003. Figures for the financial year ending 31 December 2004 are not available. Accordingly the 2003 financial year figures are used when calculating penalties in this Decision.

- 1999	£8,186,500
- 2003	£7,155,915.

Walker

14. Walker is a private limited company involved in the installation of roof frames and roof coverings.²¹
15. Walker's registered address is Hawkhill Works, Somerset Road, Ayr, KA8 9NF. Mr John Crawford Thomson and Mr James Allan Thomson, two senior managers of Walker, are referred to in this Decision.
16. Walker applied for, and was granted, conditional leniency in accordance with the OFT's leniency programme.²² As part of Walker's application for leniency, Mr John Crawford Thomson and Mr James Allan Thomson, both senior managers of Walker made witness statements in relation to Walker's application for leniency.
17. Walker's turnover for the calendar years 1999 and 2004 was as follows:²³

- 1999	[...] [C]
- 2004	[...] [C].

Lenaghan

18. Lenaghan is a private limited company. Its principal activities are as a roofing contractor concerned mainly with mastic asphalt solutions in roofing, flooring, tanking and paving. The company also undertakes built-up felt roofing works and slating repairs.²⁴ Lenaghan was a partnership during the period of the infringements.²⁵ There is not yet any publicly available turnover information for Lenaghan.²⁶
19. Lenaghan's registered address is 101a High Street, Bonnyrigg, Midlothian, EH9 2ET. Mr Charles Lenaghan and Mr Stuart Lenaghan, two senior managers of Lenaghan, are referred to in this Decision.

²¹ Financial Analysis Made Easy ('FAME') Report for Walker.

²² See footnote 13 above.

²³ See financial information produced by Walker and included in the documentation submitted to the OFT, dated 20 February 2003. Walker's turnover figures are confidential and not available from public company information sources. Consequently, the figures are not disclosed in this Decision.

²⁴ Information obtained from Lenaghan's website www.lenaghan-roofing.co.uk. However, this website no longer appears to be in use.

²⁵ By letter dated 27 August 2004 addressed to the OFT, Lenaghan's solicitors stated that they changed the legal form of Lenaghan's business from a partnership to a limited company for "purely commercial reasons". However, see paragraph 205 below.

²⁶ See www.ifa.org.uk.

20. Lenaghen applied for, and was granted, conditional leniency in accordance with the OFT's leniency programme.²⁷ As part of Lenaghen's application for leniency, Mr Stuart Lenaghen and Mr Charles Lenaghen, senior managers of Lenaghen made witness statements in relation to Lenaghen's application for leniency.
21. Lenaghen's turnover for the financial years 1999 and 2004 was as follows:²⁸
- 1999 [...] [C]
 - 2004 [...] [C].

B. The Roofing services industry in the UK – Overview

22. The Parties supply installation, repair, maintenance and improvement services in relation to flat roofs. In practice, this may mean the provision and management of personnel, equipment and material to facilitate the installation, repair, maintenance and improvement of flat roofs. In addition, flat roofing contractors typically fit rooflights, insulation and vapour control materials and carry out building and timber repairs as part of the job specifications for the flat roofing work they carry out. Therefore, for the purposes of this Decision, references to the installation, repair, maintenance and improvement services in relation to flat roofs includes work of this nature and other work that is reasonably incidental to this main flat roofing work.²⁹
23. There are three general types of roofs: flat, metal and pitched. Flat roofs are used in the industrial and commercial property sectors; metal roofs are also used in these sectors; pitched roofs are common in the domestic property sector and in some segments of the commercial property sector.³⁰ AMA Research³¹ suggests that metal coverings compete primarily with pitched roofing products (primarily tiling), and reports that one of the most important sectors for metal coverings is speculative new build in the industrial construction sector for low-cost, out of town factories and warehouses.³²

²⁷ See footnote 13 above.

²⁸ See financial information produced by Lenaghen and included in the documentation submitted to the OFT on 27 January 2005. Lenaghen's turnover figures are confidential, not available from public company information sources. Consequently, the figures are not disclosed in this Decision.

²⁹ See paragraphs 178 to 202 below.

³⁰ A 2002 Market and Business Development ('MBD') report, 'Roofing Materials and Contracting (Industrial Report)', October 2002, paragraph 3.3.

³¹ AMA Research is a leading publisher of both off-the-shelf market reports and a range of bespoke market research services. See www.amaresearch.co.uk.

³² Competition Commission (2001) Icopal Holding A/S and Icopal a/s: A report on the merger situation, p65. Available at www.competition-commission.org.uk.

24. Flat roofing may be characterised in terms of the materials normally employed as coverings. The materials used for flat roof coverings fall into four broad categories:³³
- bituminous felt (referred to in this Decision as 'felt');
 - single ply PVC membranes (referred to in this Decision as 'ply' or 'single ply');
 - liquid applied roofing systems; and
 - mastic asphalt.
25. Felt flat roof coverings are designed to be fixed on to the surface deckings of flat roofs to waterproof them. Felt coverings have effective lives of up to around 20 years.
26. Single ply PVC membrane flat roof coverings accomplish the same basic function as felt coverings, but have several advantages over felt, such as a simpler installation, the ability of the covering to move more freely and a low installation cost.
27. Liquid applied roofing systems form a further category of flat roof waterproofing coverings. These normally consist of fluid plastic materials that are typically applied by spray or brush to the receiving surface and provide a seamless waterproof covering when they solidify. None of the Scottish contracts that have come to the attention of the OFT in the context of this investigation have involved tenders for the provision of such services.³⁴
28. Mastic asphalt comes in two basic types:
- 'traditional' mastic asphalt, manufactured to British Standards³⁵ and composed of suitably graded limestone aggregates bound together with bituminous material; and
 - polymer modified mastic asphalt, where chemical compounds known as polymers are added to the bitumen binder to modify the performance characteristics of the end product; various

³³ Statement by Ivan Jerram, Chartered Quantity Surveyor, dated 30 April 2003 ('the 2003 Statement'), at paragraph 12. Ivan Jerram was initially engaged by the OFT in the context of an earlier investigation by the OFT into collusive practices (in the flat roofing sector in the West Midlands) to provide a technical overview of the flat roof coverings contracting market and to review the technical details of the relevant contracts: see Decision No CA98/1/2003 - Collusive tendering in relation to contracts for flat roofing services in the West Midlands, March 2004 (Case CP/0001-02). Ivan Jerram made a second statement to the OFT on 5 October 2004 ('Ivan Jerram's 2004 statement').

³⁴ In relation to other types of alternative flat roofing materials, in particular deck proofing, metal, hot melt and liquid applied roofing products, the OFT has insufficient facts available to it to determine whether these products form part of the same market as mastic asphalt or felt/single ply, or whether they form one or more separate product markets. The OFT has therefore reached no firm conclusion as to the extent of the mastic asphalt market, and it is not necessary for the OFT to do so in order to determine whether there has been an infringement of the Chapter I prohibition.

³⁵ See <http://www.bsi-global.com/index.xalter> for details regarding British Standards.

manufacturers market this type of material as proprietary products under trade names.

29. Mastic asphalt is melted in a mechanically agitated mixer and, when sufficiently molten to be workable, is transported to the work surface where it is spread manually on the prepared receiving surface where it solidifies. Two or sometimes three layers of asphalt may be built up to a thickness of 20 or 30 millimetres.³⁶
30. Mastic asphalt, whether of 'traditional' or polymer modified specification, has a variety of applications in the construction industry, for example roofing, flooring and paving. While the precise composition of the mastic asphalt material for a given situation may differ from that for another situation, the method of applying the material is the same throughout. For example, paving quality mastic asphalt contains harder binding material and a greater amount and size of coarse aggregate than roofing mastic asphalt and is more durable but less reliably waterproof.³⁷ However, the two types are applied in the same way and may be installed together in successive layers, for example, with the more reliably waterproof roofing type underlying the more durable paving type, a specification typically employed for roof-level car parks.³⁸
31. The Mastic Asphalt Council ('MAC') represents the UK's principal manufacturers of polymer modified mastic asphalt, together with the UK's MAC approved polymer modified mastic asphalt installers. As part of the MAC's quality assurance programme any MAC approved contractors must ensure that its employees have completed an extensive three year training programme.³⁹ There are only five MAC member manufacturers of polymer modified mastic asphalt in the UK:
 - Cambridge Asphalt Co Ltd. Ely;
 - Cambridgeshire Guaranteed Asphalt Ltd, Corby;
 - Permanite, Matlock;
 - Pure Asphalt Co Ltd., Bolton; and
 - Rock Asphalte Limited, London.
32. There are currently only three Scottish contractors, i.e. Briggs Scotland, Pirie and Lenaghan, which are MAC members and approved by MAC to install polymer modified mastic asphalt. At the time of the infringements, Walker was also a MAC member based in Scotland approved to install polymer modified mastic asphalt.

³⁶ See footnote 33, 2003 Statement.

³⁷ See footnote 33, 2004 Statement.

³⁸ *Ibid.*

³⁹ See the MAC website under www.masticasphaltcouncil.co.uk. A list of all current MAC manufacturer and installer members can be found here.

33. Industrial and commercial construction, where flat roofs and metal roofs are used, accounted for 74 per cent of the total roofing industry in the UK in 1999; in 2003, it accounted for 79 per cent of the total roofing industry.⁴⁰
34. There has been strong growth in the roofing contracting industry in the UK over the past few years with nominal growth between 1999 and 2003 taking the value of the industry to £1,625.6 million in 2003. New construction accounted for an estimated 50 per cent of the total roofing contracting industry in 2003, with a value of £807.9 million in that year. Repair and maintenance of public buildings (non-residential) accounted for 9 per cent of the roofing contracting industry in 2003, with a value of £144.8 million. The repair and maintenance of private buildings (non-residential) was valued at £326 million in 2003.
35. There is a high degree of fragmentation in the roofing contracting industry with approximately 74 per cent of companies having a turnover of less than £250,000 in 2003. Only eight per cent of the industry (470 companies) had turnovers of more than £1 million in 2002 and 2003, although 50 companies had turnovers of more than £5 million in 2002 and 60 companies had turnovers of more than £5 million in 2003.⁴¹
36. In 2002, some 69 per cent of contractors in the roofing contracting services industry employed three people at most, whilst only 13 contractors employed more than 80 people.⁴²

C. Procurement process for flat roofing services

37. The services of contractors who specialise in the installation, repair, maintenance and improvement of flat roofs are usually procured through a competitive tendering process whereby local authorities and private managing agents, architects and surveyors invite a number of contractors to submit sealed competitive bids. An essential feature of the tendering system is that prospective suppliers prepare and submit tenders or bids independently and tendering procedures are designed to provide competition in areas where it might otherwise be absent. Public authority tendering is subject to European Community⁴³ and UK public procurement rules.

⁴⁰ The information in paragraphs 33 and 34 was obtained from a report produced by Market Business Development Limited - 'Roofing Materials and Contracting (Industrial Report) – UK', April 2004.

⁴¹ Statistics in this paragraph from MBD (2002), Roofing Materials and Contracting (Industrial Report), October 2002, paragraph 7.3.

⁴² *Ibid.*

⁴³ The Public Services Contracts Regulations 1993 SI 1993/3228 implements Council Directive 92/50/EEC of 18 June 1992 relating to the co-ordination of procedures for the award of public service contracts, OJ [1992] L 209/1 ("the Public Services Directive 92/50"). The Public Services Directive 92/50, as amended by Council Directive (97/52/EC) of 13 December 2004, OJ [1997] L 323/1, which is implemented by The Public Contracts (Work, Services and Supply) (Amendment) Regulations 2000 SI 2000/2009. A new Council Directive 2004/18/EC on the co-ordination of procedures for the award of public works contracts, public supply contracts and public service contracts, aimed at simplifying the present rules regarding the award of various

38. The Competition Appeal Tribunal ('CAT') recently made the following observations concerning the procurement process for flat roofing services⁴⁴:

"The essential feature of a tendering process conducted by a local authority is the expectation on the part of the authority that it will receive, as a response to its tender, a number of independently articulated bids formulated by contractors wholly independent of each other. A tendering process is designed to produce competition in a very structured way.

The importance of the independent preparation of bids is sometimes recognised in tender documentation by imposing a requirement on the tenderers to certify that they have not had any contact with each other in the preparation of their bids. [...] The competitive tendering process may be interfered with if tenders submitted are not the result of individual economic calculation but of knowledge of the tenders by other participants or concertation between participants."

39. In certain circumstances contractors are expressly required to confirm that no collusive co-ordination took place before the submission of the tender bids. For example, the Northern Lighthouse Board, which is responsible for maintaining all Northern lighthouses in Scotland, requires a declaration to be signed by each tenderer which confirms that the tender is a bona fide competitive offer. The declaration states that:

"...the prices tendered have not been affected by any arrangement or agreement with any other person, firm or company."⁴⁵

40. Where work is sub-contracted, the main contractor may also require some form of non-collusion declaration to be completed. For example, Love Jenkins Associates Ltd., a firm of Chartered Quantity Surveyors, require all tenderers for sub-contracting work to complete a non-collusion certificate which states that:

"...we certify that this is a bona fide tender, intended to be competitive and that we have not fixed or adjusted the amount of the tender in accordance with any agreement or arrangement with any other person."⁴⁶

41. Collusive tendering (also referred to as bid-rigging) eliminates competition amongst suppliers by fixing prices and/or sharing markets and infringes the Chapter I prohibition. There are generally four types of anti-competitive arrangements that can result in a pre-selected supplier winning a contract. These are detailed below:

types of public contracts, OJ [2004] L 134/114. Member States have until 31 January 2006 to implement it into their national legislation.

⁴⁴ *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4 ("*WM Roofing I*"), at paragraphs 208 to 209.

⁴⁵ 'Northern Lighthouse Board Procurement Manual – Issue 1, Revision No 3 Active, dated 5 September 2001.

⁴⁶ Tender documentation provided by Jenkins Love Associates Ltd., dated 26 March 2003.

- Cover bidding (or cover pricing) occurs when a supplier submits a tender price for a contract that is not intended to win the contract but has been arrived at by arrangement with another supplier who wishes to win the contract. Cover bidding gives the impression of competitive bidding, but in reality, suppliers agree to submit token bids that are usually too high;
 - Bid suppression takes place when suppliers agree amongst themselves either to abstain from bidding or to withdraw bids;
 - Bid rotation is a process whereby the pre-selected supplier submits the lowest bid on a systematic or rotating basis; and
 - Market division or sharing occurs when suppliers agree amongst themselves not to compete in designated geographic regions or for specific customers or contracts.
42. The OFT notes that in the absence of a formal sub-contracting relationship, there is no legitimate reason why undertakings invited to participate in a single stage (or any other) competitively tendered process would need to communicate with one another in relation to the tender before returning their bids to those managing the tendering process.⁴⁷

D. Investigation and proceedings

43. In December 2001 it appeared to the OFT, from information received from Briggs in relation to another case concerning collusion amongst roofing contractors in the West Midlands,⁴⁸ that roofing contractors were involved in collusive tendering in relation to contracts for the supply of installation, repair, maintenance and improvement services of mastic asphalt coverings for flat roofs (and other flat surfaces).
44. Price-fixing and market-sharing agreements or concerted practices infringe the Chapter I prohibition contained in section 2(1) of the Competition Act 1998 ('the Act'). The prohibition imposed by section 2(1) of the Act is referred to in the Act and in this Decision as 'the Chapter I prohibition'. Price fixing may involve fixing either the price itself or the components of a price, and may also take the form of an agreement and/or concerted practice to restrict price competition. An agreement and/or concerted practice may therefore constitute a price-fixing agreement and/or concerted practice where it restricts price competition even if it does not entirely eliminate it.⁴⁹

⁴⁷ See statement of Ivan Jerram, dated 30 April 2003.

⁴⁸ The West Midlands case referred to is Competition Act 1998 Decision number CA98/1/2004 in case CP/0001-02, "Collusive tendering in relation to contracts for flat-roofing services in the West Midlands", dated 16 March 2004 ('the West Midlands Roofing Decision').

⁴⁹ See OFT Guideline 401 'Agreements and Concerted Practices', December 2004, paragraphs 3.5 and 3.6.

45. Information subsequently received indicated that Briggs Scotland, Lenaghan, Pirie and Walker were engaged in various collusive tendering agreements and/or concerted practices (as specified in paragraphs 57 to 171 below), whereby the Parties engaged in collusive tendering in relation to the tender prices submitted to local authorities and private undertakings for the supply of installation, repair, maintenance and improvement services for mastic asphalt coverings for flat roofs (and other flat surfaces) in Scotland. The Parties have been granted conditional leniency in accordance with the OFT's leniency programme (see, respectively, paragraphs 8, 12, 16 and 20 above).
46. The evidence also indicated that some of the Parties had engaged in collusive tendering activities for other non-mastic asphalt flat roof covering services in Scotland which resulted in the initiation of a further separate investigation by the OFT, which is ongoing.

Section 28 inspections

47. On 8 October 2002, the OFT decided that there were reasonable grounds for suspecting that a group of flat roofing contractors had been engaged in collusive tendering activities in relation to the supply of installation, repair, maintenance and improvement services for mastic asphalt coverings for flat roofs (and other flat surfaces) in Scotland thereby infringing the Chapter I prohibition. The OFT then began a formal investigation under the Act.⁵⁰ On 12 November 2002, the OFT obtained warrants from the Court of Session to enter and search the premises of the following undertakings under section 28 of the Act:⁵¹
- Pirie, searched on 20 November 2002;
 - Walker, searched on 20 November 2002; and
 - Lenaghan, searched on 20 November 2002.

Section 26 notices

48. A notice requiring information under section 26 of the Act⁵² was sent to a third party, Clark Contracts Ltd., a building contractor specialising in building refurbishment, alteration, repairs and maintenance on 3 March 2003.

⁵⁰ Section 25(2) of the Act (section 25, as it was at the time) empowers the OFT to conduct an investigation where it has reasonable grounds to suspect that the Chapter I prohibition has been infringed. The Act has been amended recently by SI 2004/1261 – The Competition Act 1998 and Other Enactments (Amendment) Regulations 2004. Since this investigation took place prior to this amendment, references to the Act in this Statement refer to the Act prior to the amendments.

⁵¹ Under section 28 of the Act as it applied prior to 1 May 2004, having obtained a warrant from a High Court judge or the Court of Session, the OFT may enter and search an undertaking's premises.

⁵² Section 26 of the Act empowers the OFT, for the purposes of an investigation under section 25 of the Act, to require any person to produce to it a specified document, or to provide it with specified information, which it considers relates to any matter relevant to the investigation.

Information obtained not using formal powers

49. At various points during the OFT's investigation, voluntary statements were obtained from employees of the following third parties involved in putting contracts out to tender:
- The Northern Lighthouse Board;
 - AR Campbell (Construction) Ltd.;
 - HGB Construction Scotland Ltd.;
 - Bielski Associates Ltd.;
 - David H Allan Ltd.; and
 - Love Jenkins Associates Limited and James Barr.
50. Additional information was also produced by leniency applicants Ruberoid plc, and Pirie:
- a questionnaire prepared by Mr A, a senior manager of Briggs Scotland produced as a result of an internal audit conducted by Briggs' legal representatives and attached to a covering letter sent to the OFT dated 12 April 2002;
 - a memorandum prepared by Mr B, a senior manager of Briggs, dated 1 February 2002; and
 - a memorandum prepared by Mr D, an estimator/surveyor of Pirie sent to the OFT attached to a covering letter dated 2 December 2002.
51. The OFT carried out a number of interviews during its investigation, as detailed below:
- Mr A⁵³, a senior manager of Briggs Scotland, on 11 September 2002;
 - Mr F⁵⁴, contracts manager of Briggs Scotland, on 12 September 2002;
 - Mr K⁵⁵, commercial manager of Briggs Scotland, on 18 October 2002;
 - Mr Stuart Lenaghan, a senior manager of Lenaghan, on 13 May 2003;
 - Mr Charles Lenaghan, a senior manager of Lenaghan, on 13 May 2003;
 - Mr D⁵⁶, an estimator/surveyor of Pirie, on 1 April 2003;
 - Mr H⁵⁷, an estimator/surveyor of Pirie, on 1 April 2003;

⁵³ See footnote 11 above. This interview was given voluntarily.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ See footnote 18.

⁵⁷ *Ibid.*

- Mr John Crawford Thomson, a senior manager of Walker, on 26 February 2003; and
- Mr James Allan Thomson, a senior manager of Walker, on 20 November 2002.

52. On 2 November 2004 a Statement of Objections under rule 14(1) of the OFT's procedural rules⁵⁸ ('the Statement') was issued to all the Parties. Briggs, Pirie and Lenaghan chose to make written representations to the OFT in response to the Statement in relation to the facts and conclusions set out in the Statement and/or in relation to the level of penalty that the OFT might impose for the infringements alleged. Walker did not submit any written representations and none of the Parties made oral representations to the OFT.⁵⁹

E. The contracts

53. The table below sets out, for each of the infringements specified by the OFT in paragraphs 57 to 171 below, the contract in question, the customer/main contractor that requested the work to be undertaken, the participants in the infringement, the month and year that the contract in question was put out to tender and, where known, the party which ultimately won the contract. In each case in the 'Participants' column, the contractor receiving cover bids from the other contractors in order to secure the contract is highlighted in bold.

Contract	Customer/ main contractor*	Participants	Put out to tender	Award of contract
Ailsa Craig Lighthouse	Northern Lighthouse Board	Lenaghan Walker	August 2000	Lenaghan
Access walkways, High Street, Tillicoultry	Clackmannanshire Council	Pirie Briggs Scotland/Durastic Lenaghan	September 2000	Briggs Scotland/Durastic
Asda Stores, Car Park Roof, Ayr	Bielski Associates	Briggs Scotland/Durastic Walker Pirie	May 2001	Not clear whether contract awarded
Cardinal Newman High School, Bellshill	North Lanarkshire Council/ David H Allan	Pirie Briggs Scotland Walker	April 2001	Pirie

⁵⁸ The Competition Act 1998 (Director's rules) Order 2000 SI 2000 No 293, replaced on 17 November 2004 by the Competition Act 1998 (Office of Fair Trading's Rules) Order 2004 (SI 2004/2751).

⁵⁹ A supplementary Statement of Objections ('Supplementary Statement') was sent to Walker on 28 February 2005. Walker did not make any representations in response to the Supplementary Statement.

Contract	Customer/ main contractor*	Participants	Put out to tender	Award of contract
Elderspark Clinic, Glasgow	Greater Glasgow NHS Trust	Pirie Walker	December 2001	Not clear whether contract awarded
Tibetan Centre, Phase I Roof	Haywood/ Love Jenkins Associates	Pirie Walker	April 2000	Pirie
Tibetan Centre, Phase II Internal Fit-Out	Postlethwaite / Melville Dundas/ Robison & Davidson Ltd/ Haywood	Pirie Walker	January 2002	Pirie
BT Extension, Thistle Shopping Centre, Stirling	Standard Life / HBG Construction	Briggs Scotland/ Durastic Pirie Lenaghan	September 2000	Briggs Scotland/ Durastic
BBC Studios 4,5 and 6, Glasgow	Clark Contracts	Pirie Walker	November 2001	Not clear whether contract awarded
Clydeaway Skypark, Glasgow	Lilley Construction	Pirie Walker	March 2001	Not clear whether contract awarded
Glasgow College of Nautical Studies	James Barr	Pirie Walker Briggs Scotland/ Durastic	July 2001	Briggs Scotland/ Durastic
Hamilton Town Hall	HBG Construction/ Balfour Beatty/ Melville Dundas/ Lilley Construction	Pirie Walker	July 2002	Not clear whether contract awarded

*For some contracts it has not been possible to identify all the main contractors invited to tender for the lead contract. On some occasions this has been because the work never proceeded and therefore the paperwork relating to the contract was destroyed; on others it has been due to the fact that the work was completed and the paperwork is no longer available.

54. A photocopy of the register of tenders in the form of a manuscript spreadsheet (the original no longer exists) which staff at Briggs Scotland kept, recording contracts which were subject to collusive tendering activities between 1993 and 2001 was submitted to the OFT by Briggs Scotland in connection with Ruberoid's leniency application.
55. The table below contains a summary of some of the information contained in the Register that relate to contracts which are subject to this Decision. The Register also contains references to other contracts. The OFT has not pursued these in this Decision as: either, (i) the specified contracts (and the related collusive activities) predated the introduction of the Act which came into force on 1 March 2000; (ii) the OFT was unable to corroborate the information contained in the Register in a satisfactory manner; or (iii) the contracts are dealt with in the context of a separate investigation.

DATE	CONTRACT/CLIENT	Spec	D	P	L
June-00	"Thistle Centre"	P/Phalt	✓		
September-00	"Walkways Tillicoultry - (Pirie & Lenaghan informed)"	Perm'ph-permapark	✓		
December-00	"Bellshill School Permapark Jim Stables/Hase Thompon"	Perm		✓	
December-00	"Asda Ayr MorrisandSpottiswood Permapark"	Perm	✓		

56. According to Mr A⁶⁰, a senior manager of Briggs Scotland, the collusive tendering activities in relation to polymer modified asphalt work operated in the following manner: "one contractor would phone the others to say that they had a lead in a job, and others would submit a higher bid for the contract than the one who had the lead." Due to the explanation given by Mr A regarding the operation of the Register the name of the contractor seeking cover would be marked in the Register as a tick under either 'D' for Durastic, 'P' for Pirie or 'L' for Lenaghan. Therefore, when Mr A refers to 'others' this means that a cover price would have been provided by the other two contractors involved in the arrangement, Pirie and Lenaghan. Mr A's statement is corroborated by Mr K⁶¹ and Mr F, both managers of Briggs Scotland. Mr F also stated that,⁶² when Mr McPherson died⁶³, he "took on the role of contacting other companies" specifying that these other companies were Pirie and Lenaghan for the purpose of the contacts on the Register.

F. Evidence relied on by the OFT in relation to individual contracts

i. Ailsa Craig Lighthouse

Facts

57. The Northern Lighthouse Board ('the NLB') is responsible for maintaining Northern lighthouses. The NLB's civil engineer, Mr R D McIntosh, prepared a report on the re-roofing works required at the Ailsa Craig Lighthouse on 14 August 2000, and estimated that the cost would be approximately £40,000.⁶⁴

⁶⁰ See record of interview of Mr A, a senior manager of Briggs Scotland, dated 11 September 2002, and footnote 11.

⁶¹ See record of interview of Mr K, Commercial Manager of Briggs Scotland, dated 18 October 2002.

⁶² See record of interview of Mr F, Contracts Manager of Briggs Scotland, dated 12 September 2002.

⁶³ Mr McPherson was the branch manager of Briggs Scotland who originally kept the Register.

⁶⁴ See statement of Fiona Lynch, Commercial Manager of the Commissioners of Northern Lights, operating as the Northern Lighthouse Board, dated 25 February 2003 and associated document, Ref FL7.

58. The contract was for the replacement of the roof covering of the main block of the Ailsa Craig Lighthouse using a polymer modified mastic asphalt solution supplied by Permanite, or similar approved product including a 20 year guarantee.⁶⁵ The NLB specified the contractors which were to be invited to tender as detailed below. All contractors were requested to declare that they had not colluded with any other party and had not provided or received incentives in respect to the tender procedure.⁶⁶
59. The nature of the work, offshore and in all weathers meant that there were a limited number of contractors who would be willing to tender for this work. On 15 August 2000, the NLB sent invitations to tender to Briggs Scotland, Lenaghan, Pirie and Walker, with a return date of 6 September 2000.⁶⁷
60. The NLB's tender procedures state that any work up to the sum of £100,000 must be tendered for by a minimum of three companies. Amounts over that sum require a minimum of five companies.⁶⁸ Only three bids were returned. These were opened on 6 September 2000.
61. The NLB is not duty bound to accept the lowest tender but may take into consideration a number of factors including, the most economically advantageous, any issue concerning health and safety, and time scale constraints.⁶⁹
62. The bids submitted were as follows:⁷⁰

Contractor	Bid received (£)	Date received
Briggs Scotland	62,868.40	30 August 2000
Lenaghan	45,988.00	6 September 2000
Pirie	No tender submitted	N/A
Walker	49,385.00	2 September 2000

63. On 11 September 2000, a letter was sent to Lenaghan awarding them the contract.⁷¹

⁶⁵ Specification set out in an inter-departmental memorandum prepared by R D McIntosh on 14 August 2000. See also NLB's Procedures Manual.

⁶⁶ See section 6 of NLB's Tender Procedures Procurement Manual.

⁶⁷ See statement of Fiona Lynch, Commercial Manager for the Commissioners of Northern Lights, operating as the Northern Lighthouse Board, dated 25 February 2003.

⁶⁸ See footnote 67 above.

⁶⁹ *Ibid.*

⁷⁰ See tender summary sheet for the re-roofing of the Ailsa Craig Lighthouse produced by NLB, dated 6 September 2000. See also documents Ref FL8, FL9 and FL10.

⁷¹ See Letter from Fiona Elder, Procurement Manager of The Northern Lighthouse Board, dated 11 September 2000. Ref FL11. Produced by Fiona Lynch, Commercial Manager for the Commissioners of Northern Lights operating as, The Northern Lighthouse Board on 25 February 2003.

Evidence of agreement and/or concerted practice

64. Fax dated 11 August 2000 from Chas B. Lenaghan of Lenaghan to J. Thomson of Walker.⁷² This fax header sheet, which notes that the fax was sent at "08:12" on 11 August 2000, states:

" Ailsa Craig Lighthouse
John,
We have put your name forward to N.L.B for Permaphalt work at above.
We have measured.....and given them a price.
Can you phone me if you get enquiry"

65. Fax dated 16 August 2000 sent from Charlie Lenaghan of Lenaghan to John Thomson of Walker.⁷³ This fax header sheet, which notes that it was sent at "12.57" states:

" Ailsa Craig Lighthouse
Our Bill for above £40,988.00
Prices 21/7/2000
There are now extras over above (as per NLB letter)
1) Picking up cargo bags from NLB Leith Docks
2) Loading up same and taking to Oban Depot (5 no Lorries)
3) Loading of Bags at Ailsa Craig for ship & uplift to Oban Depot
4) Picking up Plant and Rubbish for removal back to Edinburgh (lorries)
(from Oban Depot)
5) Disposal of rubbish at this end, Cargo bags back to NLB Glasgow.
(Skips)

(£5,000)
Our Price now £45,988.00"

66. This fax consists of three pages. The second page is a copy of a letter from Chas (Charlie) B. Lenaghan, of Lenaghan, dated 21 July 2000, addressee unknown, which states Lenaghan's original bid for this contract was £40,988.00 plus VAT. The third page of the fax sets out what work is required.
67. Evidence by leniency applicant Walker. (Statement by Mr John Thomson, a senior manager of Walker). Mr Thomson stated in relation to the fax set

⁷² This fax was found by the OFT officials on a section 28 visit to Walker's premises on 20 November 2002. Ref CET/16.

⁷³ *Ibid.*

out at paragraph 65 above that Lenaghan requested Walker to submit a cover price.⁷⁴ Mr Thomson went on to explain, "the fax shows that Lenaghan price quote for the job is £40,988 and we were asked to submit a higher price. ... The cover price quoted was £49,385, clearly higher than Lenaghan price. I understand Lenaghan got the job."

68. Evidence by leniency applicant Lenaghan. (Taped interview record of Mr Stuart Lenaghan and Mr Charles Lenaghan, senior managers of Lenaghan). When asked to clarify whether a cover price had been requested for the Ailsa Craig Lighthouse contract, Mr Stuart Lenaghan stated,⁷⁵ "That was a job we won. As I said to you, it's a job our fellow competitors would not touch because of the location. It's a rock station, and it's just basically getting in and out and the guys who are our competitors [sic] and not interested in doing these jobs, so we did supply our price to our fellow competitors: Walker." With regard to how the cover pricing arrangement operated, Mr Charles Lenaghan stated, "We wouldn't go to any other towns to work because it costs us money. We prefer to get work in Edinburgh, and that's how it works." Mr Charles Lenaghan was then asked which other companies were part of these arrangements, to which Mr Charles Lenaghan stated, "Well from what we gather, Walker, Pirie and Durastic."

ii. Access Walkways, High Street, Tillicoultry

Facts

69. On 4 September 2000, Clackmannanshire Council sent invitations to tender to a number of construction firms for works at a block of flats (Access Walkways) at High Street Tillicoultry. Clackmannanshire Council specified that Permaphalt polymer modified asphalt, as supplied by Permanite Ltd., was to be used for the mastic asphalt roofing works. The tender had a return date of 25 September 2000.⁷⁶ The main contract was awarded to A.R. Campbell (Construction) Ltd. ('A.R. Campbell').
70. The tender documentation⁷⁷ from Clackmannanshire Council listed the sub-contractors approved by Permanite Ltd. for the installation of Permaphalt as Briggs Scotland, Durastic⁷⁸, Lenaghan and Pirie.
71. In order to prepare a bid for the main contract, A.R. Campbell sub-contracted the mastic asphalt roofing works element of the contract and accordingly, sent invitations to tender to Briggs Scotland, Durastic,

⁷⁴ See report dated 20 January 2003 prepared by Mr John Thomson, a senior manager of Walker, as part of Walker's leniency application.

⁷⁵ See taped interviews of Mr Stuart Lenaghan and Mr Charles Lenaghan, senior managers of Lenaghan, dated 13 May 2003.

⁷⁶ Third party statement from D Buck Estimating Manager of A.R. Campbell, dated 25 February 2003.

⁷⁷ See documentation provided by D. Buck of A.R. Campbell on 25 February 2003.

⁷⁸ Durastic was a subsidiary of Briggs. See also paragraph 4 above.

Lenaghan and Pirie on 6 September 2000. The tenders had a return date of 13 September 2000.

72. According to A.R. Campbell, Clackmannanshire Council would always specify the materials that must be used for its roofing contracts. When looking to sub-contract, four contractors would usually be chosen. However, occasionally this might be reduced to only two or three, depending on the size of the roofing works compared with the overall value of the contract. Generally, invitations to tender for contracts requiring mastic asphalt would be sent to Briggs Scotland⁷⁹, Durastic, Lenaghan and Pirie. A.R. Campbell was not aware at the time that Durastic and Briggs Scotland are part of the same group.⁸⁰ Another important factor on this occasion was that all these companies could provide a manufacturer's insurance backed guarantee.
73. The tender bids received, excluding VAT, were as follows:⁸¹

Contractor	Bid received (£)	Date received
Durastic	21,451.15	21 September 2000
Briggs Scotland	23,325.42	21 September 2000
Lenaghan	23,390.02	21 September 2000
Pirie	22,261.97	26 September 2000

74. Durastic was selected as the preferred sub-contractor because it submitted the lowest bid.⁸² A letter was sent to Durastic confirming A. R. Campbell's formal acceptance of Durastic's bid on 18 October 2000.⁸³

Evidence of agreement and/or concerted practice

75. Undated document provided by leniency applicant Ruberoid.⁸⁴ Piece of paper produced by Briggs Scotland with hand-written script on it. The document states:⁸⁵

“Steve,

⁷⁹ Briggs Scotland is the Scottish branch of Briggs.

⁸⁰ See paragraph 4 above.

⁸¹ No explanation was given by D. Buck, Estimating Manager of A.R. Campbell as to why the tenders were returned after the tender return date. For details of the bid submitted by each party, see letters from Lenaghan, Briggs Scotland, Pirie and Durastic to A. R. Campbell produced by D. Buck to support his witness statement.

⁸² See footnote 76 above.

⁸³ *Ibid.*

⁸⁴ Ruberoid applied for leniency on behalf of itself and all its subsidiaries (including Briggs and Briggs Scotland/Durastic).

⁸⁵ This document was taken from Briggs Scotland as part of the leniency application made by Ruberoid. Ref (B) BG4.

Can you liaise with Jim Walkways 12 -22 & 34 -.42 High Street Tillicoultry. A budget price was submitted on 13/10/99 to S.D.C (Do you have original papers?), for a slightly larger area.

Good fat price required incorporating foam glass.resent final contract files for guidance.

DMO”

76. Evidence by leniency applicant (Ruberoid).⁸⁶ (Record of Interview of Mr A⁸⁷, a senior manager of Briggs Scotland).⁸⁸ This contract was on the Register,⁸⁹ and shows a tick in the column for Durastic (Briggs Scotland). Accordingly, from the explanation given by Mr A regarding the operation of the Register,⁹⁰ this would indicate that Briggs Scotland was the contractor seeking cover and a cover price would have been provided by the other two contractors involved in the arrangement, Pirie and Lenaghen. Also noted in the Register was the following, “(Pirie & Lenaghen informed)”. Mr A went on to state when asked by OFT officials, which other contractors were involved, “Pirie and Lenaghen and on one or two occasions Walker, but he was a very small player. If a very large contract English contractor may be involved but no contact regarding cover-bids.”
77. Evidence by leniency applicant, Ruberoid. Mr A, a senior manager of Briggs Scotland, also completed a questionnaire produced as a result of an internal audit conducted by Briggs' legal representatives in connection with this contract. Mr A noted that Lenaghen and Pirie had given cover prices to Briggs Scotland in September 2000 and that the value of the contract was £22,000.⁹¹
78. Evidence by leniency applicant Ruberoid. (Memorandum prepared by Mr B,⁹² a senior manager of Briggs). Mr B, a senior manager of Briggs, prepared an internal memorandum setting out the contracts that had been subject to collusion. This information had been compiled from interviews with all managers. Mr B notes the following: “September 2000,

⁸⁶ Ruberoid applied for leniency on behalf of itself and all its subsidiaries (including Briggs and Briggs Scotland).

⁸⁷ Having regard to the provisions relating to confidentiality contained in sections 237, 238, 241 and 244 of the Enterprise Act 2002, to paragraph 3.18 of OFT Guideline 423 'OFT's guidance as to the appropriate amount of a penalty' (December 2004), and to the particular circumstances of this case, the OFT has withheld the names of individuals within the leniency applicant companies who provided direct evidence to the OFT in the form of interviews or witness statements and who have demonstrated to the OFT that the disclosure of their identities might significantly harm their interests.

⁸⁸ See record of interview of Mr A, a senior manager of Briggs Scotland, dated 11 September 2002.

⁸⁹ See paragraphs 54 - 56 above. See also footnote 87 above regarding confidentiality.

⁹⁰ See paragraphs 54 - 56 above.

⁹¹ The questionnaire was completed by Mr A (a senior manager of Briggs Scotland) as part of an internal investigation by Briggs, sent by Briggs' legal representatives (Hammond Suddards Edge) to the OFT attached to a covering letter dated 12 April 2002.

⁹² See footnote 87 above.

Tillicoultry” indicating that Briggs Scotland was the contractor seeking cover and cover prices were provided by Pirie and Lenaghan.⁹³

79. Evidence by leniency applicant Pirie.⁹⁴ On 2 December 2002, Pirie sent a covering letter to the OFT attaching a list of all contracts quoted from 1 March 2000. The relevant member of staff for each department subsequently examined the list and endeavoured to remember where any collusion might have taken place. In connection with the Access Walkways contract, as far as Mr D,⁹⁵ an estimator of Pirie in the mastic asphalt department, could recall, this contract was subject to collusion. It is noted that Briggs Scotland had been the contractor seeking cover and that cover prices had been provided by Pirie and Lenaghan. The document shows that a quote of £22,261.97 was submitted on 26 September 2000.
80. Evidence by leniency applicant Lenaghan. (Taped interview record of Mr Stuart Lenaghan, and Mr Charles Lenaghan, senior managers of Lenaghan). When asked to explain whether cover bidding was involved in the tendering of this contract by OFT officials, Mr Stuart Lenaghan stated that, “The contract is jogging my memory, but if it was a cover price, I couldn't honestly say. I've a feeling it was mentioned by either Durastic or Briggs that they were going for this contract.”⁹⁶ With regard to how the cover pricing arrangement operated, Mr Charles Lenaghan stated, “We wouldn't go to any other towns to work because it costs us money. We prefer to get work in Edinburgh, and that's how it works.” When Mr Stuart Lenaghan was asked about the identities of the other companies which were part of these arrangements, he referred to Durastic,⁹⁷ Briggs Scotland, Pirie and Walker.⁹⁸

iii. Asda Stores Ltd, Roof Car Park, Ayr

Facts

81. Bielski Associates Ltd. ('Bielski Associates'), a firm of consulting civil and structural engineers were instructed by Asda Stores Ltd. ('Asda'), to prepare a report on the deterioration of the surface of the Asda's Ayr store roof top car park. Morris and Spottiswood Construction ('MS Construction'), one of Asda's partner contractors, had previously commissioned a report⁹⁹ from Permanite Ltd. on the condition of the car park surface which contained a specification for a “like-for-like” mastic

⁹³ See memorandum by Mr B, a senior manager of Briggs, dated 1 February 2002.

⁹⁴ Documentation produced by Pirie on 2 December 2002.

⁹⁵ See footnote 87 above.

⁹⁶ See statement of Mr Stuart Lenaghan, a senior manager of Lenaghan, dated 13 May 2003. This statement was given voluntarily.

⁹⁷ Durastic is a trading style of Briggs. See paragraph 4 above.

⁹⁸ See statements of Mr Stuart Lenaghan and Mr Charles Lenaghan, senior managers of Lenaghan, dated 13 May 2003. These statements were given voluntarily.

⁹⁹ The date of this report is unknown.

asphalt surfacing replacement. Using this specification, MS Construction had obtained an estimate for the work from Durastic, giving an estimated range of £300,000 to £400,000. However, at this stage, Charles Nisbet, Senior Project Engineer for Bielski Associates was asked for his opinion. Charles Nisbet subsequently advised that such a costly remedial proposal should not be undertaken without properly establishing the cause(s) of the defect.¹⁰⁰

82. Charles Nisbet, Bielski Associates, was subsequently instructed to support and assist MS Construction in obtaining three quotes for the 'like-for-like' replacement and also prices for alternative surface replacements. The contractors invited to tender for the "like-for-like" replacement surface were selected on the basis that they were all on Permanite's list of approved installers¹⁰¹ for their 'Permapark' mastic asphalt roofing system. Pirie, who was on Permanite's approved list, was already tendering for the "like-for-like" replacement surface but could also offer "alternative" membrane specifications.¹⁰²
83. Bielski Associates sent invitations to tender to Pirie and John T. Metcalfe¹⁰³ for "alternative" surface replacements (i.e. non-Permapark roofing systems) on 10 May 2001 with a return date of 16 May 2001. A report prepared by Bielski Associates in consultation with MS Construction in May 2001 states that the following tenders were received.¹⁰⁴ With regard to the "Alternative" specifications:

Contractor	Bid received (£)	Date bid sent
John T. Metcalfe ¹⁰⁵	252,552.00 + VAT	15 May 2001 ¹⁰⁶

¹⁰⁰ Report prepared by Bielski Associates Ltd in consultation with MS Construction - Repairing Surfacing to Roof Car Park For Asda Stores Ltd, May 2001 (third party interview).

¹⁰¹ See paragraph 5 above.

¹⁰² See witness statement of Charles Ingram Nisbet, senior project engineer for Bielski Associates, dated 26 March 2003.

¹⁰³ John T. Metcalfe, Specialist Contractors for Chemical Resistant Membranes and Screeds, Waterproofing & Leaksealing, Concrete Repair, High Performance Flooring Systems and Resin & Grout Injection.

¹⁰⁴ Report prepared by Bielski Associates Ltd in consultation with MS Construction - Repairing Surfacing to Roof Car Park For Asda Stores Ltd, May 2001 (third party interview).

¹⁰⁵ For the alternative roofing solutions, Bielski Associates advised that they had to "take pot luck" when deciding which roofing contractors to invite to tender. Pirie was already tendering for the "like-for-like" aspect and following discussions with them it transpired that they could also offer "alternative" membrane specifications. John T. Metcalfe is a roofing contractor based in Teesside. They were invited to tender because they had been used by Asda on a previous contract. See witness statement of Charles Ingram Nisbet, senior project engineer for Bielski Associates, dated 26 March 2003.

¹⁰⁶ Document produced by Bielski Associates (third party interview), letter sent by John Metcalf, Managing Director of John Metcalfe Ltd., to Charles Nisbet of Bielski Associates Ltd., dated 15 May 2001.

Contractor	Bid received (£)	Date bid sent
Pirie (a) ¹⁰⁷	389,000.00 + VAT	23 May 2001 ¹⁰⁸
Pirie (b)	385,000.00 + VAT	23 May 2001

84. A report prepared by Bielski Associates in consultation with MS Construction in May 2001 states that the following tenders were received with regard to the “like-for-like” specifications.¹⁰⁹ With regard to the “Like-for-like”:

Contractor	Bid received (£)	Date bid sent
Walker	395,600.00 + VAT	24 May 2001 ¹¹⁰
Pirie	357,985.98 + VAT	23 May 2001 ¹¹¹
Durastic	350,102.09 + VAT	23 May 2001 ¹¹²

85. As stated above, the contractors invited to submit “like-for-like” bids were chosen because they were on Permanite's list of approved installers for their 'Permapark' mastic asphalt roofing system. Whilst these quotes were being obtained, it was still not certain whether any of the bids would be acceptable on technical grounds and, as a consequence, whether the contract would actually proceed.¹¹³

Evidence of agreement and/or concerted practice

86. Evidence by leniency applicant Ruberoid.¹¹⁴ Fax sent by Durastic to John Thomson of Walker, dated 23 May 2001. The fax header sheet states:¹¹⁵

“subject Asda Ayr

¹⁰⁷ See quotation sent by Pirie to MS Construction, dated 23 May 2001. a) refers to Flexiphalt specification which is a combined fully bonded felt and mastic asphalt system; and b) refers to Eliminator/Mastic Asphalt which is a combined spray applied waterproofing and Mastic Asphalt paving system. Document provided by Bielski Associates.

¹⁰⁸ See fax from Jim Stables of Pirie to David Hendren of MS Construction dated 23 May 2001.

¹⁰⁹ Report prepared by Bielski Associates Ltd in consultation with Morris and Spottiswood Construction - Repairing Surfacing to Roof Car Park For Asda Stores Ltd, May 2001 (third party interview).

¹¹⁰ Letter from John Thomson of Walker, to Charlie Nisbet of Bielski Associates, dated 24 May 2001. Document produced by Bielski Associates Ltd.

¹¹¹ Document provided by Bielski Associates, Fax sent by Jim Stables of Pirie to David Hendren of MS Construction, dated 23 May 2001.

¹¹² Document provided by Bielski Associates. Fax sent by Jim McVeagh of Durastic.

¹¹³ See witness statement of Charles Ingram Nisbet, senior project engineer for Bielski Associates, dated 26 March 2003.

¹¹⁴ Briggs Scotland/Durastic form part of the economic entity ultimately controlled by Ruberoid. As part of the leniency application made by Ruberoid, statements were taken from Briggs Scotland.

¹¹⁵ This fax was found by OFT officials during a section 28 visit to Walker's premises on 20 November 2002. Ref CET/17

Our rates"

87. The fax consists of four pages, the fax header sheet, plus three pages setting out the breakdown of the total figure quoted, in the sum of £350,102.09.
88. Evidence by leniency applicant Pirie.¹¹⁶ On 2 December 2002, Pirie sent a covering letter to the OFT attaching a list of all contracts quoted from 1 March 2000. The relevant member of staff for each department subsequently examined the list and endeavoured to remember where any collusion might have taken place. In connection with the Asda Store roof car park contract, as far as Mr D,¹¹⁷ an estimator of Pirie in the mastic asphalt department, could recall, this contract was subject to collusion. It is noted that Briggs Scotland had been the contractor seeking cover and that cover prices had been provided by Pirie, Lenaghan and Walker.
89. Evidence by leniency applicant Walker. (Statement of Mr John Thomson, a senior manager of Walker). Mr Thomson stated that, "I think that Durastic initiated this collusive tendering activity by asking WG Walker to submit a cover price by fax dated 23 May 2001. Durastic have simply specified that the rates attached to the fax are their rates. ... We received an invitation to tender from [MS Construction] dated 16 May 2002.¹¹⁸ We replied to this invitation to tender by letter dated 24 May 2001. ...Our rates tendered were higher than those of Durastic and we quoted the sum of £395,600 plus VAT."¹¹⁹
90. Evidence by leniency applicant Lenaghan. (Taped interview record of Mr Stuart Lenaghan, and Mr Charles Lenaghan, senior managers of Lenaghan). When shown documents BG17 and KB20, Mr Stuart Lenaghan replied, "I'm assuming that if this is a cover bid, that it was for the big boys, I think, because that's far too big for Walker and it's too big for us. I would assume it's coming from Briggs or Durastic...."¹²⁰ With regard to how the cover pricing arrangement operated, Mr Charles Lenaghan stated, "We wouldn't go to any other towns to work because it costs us money. We prefer to get work in Edinburgh, and that's how it works." When Mr Stuart Lenaghan was asked about the identities of the other companies which were part of these arrangements, he referred to Durastic, Briggs Scotland, Pirie and Walker.¹²¹

¹¹⁶ Documentation produced by Pirie on 2 December 2002.

¹¹⁷ See footnote 87 above.

¹¹⁸ The OFT notes that this date is clearly a typographical error, as it should refer to '2001'.

¹¹⁹ See report dated 20 January 2003 prepared by Mr John Thomson, a senior manager of Walker as part of their leniency application.

¹²⁰ See record of interview of Mr Stuart Lenaghan and Mr Charles Lenaghan, senior managers of Lenaghan, dated 13 May 2003.

¹²¹ See statement of Mr Stuart Lenaghan, a senior manager of Lenaghan, dated 13 May 2003. This statement was given voluntarily.

iv. Cardinal Newman High School, Bellshill

Facts

91. North Lanarkshire Council sent out invitations to tender for various works at Cardinal Newman High School. D H Allan Ltd ('D H Allan') was subsequently appointed as the main contractor. The roofing element of the contract was sub-contracted and invitations to tender, together with all relevant pages from the preliminary specification bill of quantities and drawings, were sent to the three or four sub-contractors known to D H Allan and which D H Allan believed could undertake the required roofing work. D H Allan's policy was always to award the contract to the lowest bidder fulfilling the requirements of the tender.¹²²
92. Permanite's Permaphalt polymer modified mastic asphalt was to be used for the roofing element and the invitations to tender sent to the roofing contractors specified this requirement.¹²³
93. D H Allan sent out invitations to tender for the roofing works at Cardinal Newman High School on 11 April 2001. These were addressed to Pirie, Lenaghan, Walker and Briggs Scotland. On 19 June 2001 the following tenders were recorded as having been received by D H Allan:¹²⁴

Contractor	Bid received (£)	Date received
Pirie	31,983.16	25 April 2001
Lenaghan	33,774.45	unknown
Walker	34,787.75	unknown
Briggs Scotland	36,132.80	unknown

94. Pirie, the lowest bidder meeting all the specified requirements, was awarded the contract on 19 June 2001.¹²⁵

Evidence of agreement and/or concerted practice

95. Fax sent from Jim Stables of Pirie to John Thomson of Walker, dated 24 April 2001. The fax header sheet, which notes that the fax was sent at "10.47am" states:¹²⁶

¹²² See witness statement of George Allan, Managing Director of David H Allan Ltd, dated 26 February 2003.

¹²³ See witness statement of George Allan, Managing Director of David H Allan, dated 26 February 2003, and associated documentation, in particular the quote submitted by Pirie. It is not clear whether Permanite Permaphalt polymer modified asphalt was specified by Cardinal Newman High School or D H Allan, the main contractor.

¹²⁴ See document entitled 'Sub-contractor Quotes received as at 15.15pm Tuesday 19 June 2001. Produced by George Allan, Managing Director of David H Allan to support his witness statement, dated 26 February 2003.

¹²⁵ See document entitled 'Sub-contractor Quotes received as at 15.15pm Tuesday 19 June 2001. Produced by George Allan, Managing Director of David H Allan to support his witness statement, dated 26 February 2003.

¹²⁶ This fax was found by OFT officials on a section 28 visit to Walker's premises on 20 November 2002. Ref CET/12.

“Subject: Cardinal Newman H.S., Bellshill

Attached please find copy of our quotation for the **Mastic Asphalt** work at the above location as discussed.

As usual, these are **OUR RATES**.

Thanks

Jim”

96. The fax consists of five pages, the fax header sheet plus a further four pages providing a breakdown of the total price submitted in the sum of £31,983.16.
97. Evidence by leniency applicant Ruberoid.¹²⁷ (Record of Interview of Mr A, a senior manager of Briggs Scotland).¹²⁸ This contract was on the Register,¹²⁹ and shows a tick in the column for Pirie. Accordingly, from the explanation given by Mr A,¹³⁰ this would indicate that Pirie was the contractor seeking cover and a cover price would have been provided by the other two contractors involved in the arrangement, Durastic (Briggs Scotland) and Lenaghen.
98. Evidence by leniency applicant Ruberoid. (Memorandum prepared by Mr B, a senior manager of Briggs). Mr B¹³¹ prepared an internal memorandum setting out the contracts that had been subject to collusion. This information had been compiled from interviews with all managers. Mr B notes, “Cardinal Newman High School Bellshill, August 2001, value £33,000”. Mr B noted that Pirie had been the contractor seeking cover and that a cover price had been provided by Briggs Scotland.
99. Evidence by leniency applicant Pirie.¹³² On 2 December 2002, Pirie sent a covering letter to the OFT attaching a list of all contracts quoted from 1 March 2000. The relevant member of staff for each department subsequently examined the list and endeavoured to remember where any collusion might have taken place. In connection with the Cardinal Newman school contract, as far as Mr D,¹³³ an estimator of Pirie in the mastic

¹²⁷ Briggs Scotland/Durastic form part of the economic entity ultimately controlled by Ruberoid. As part of the leniency application made by Ruberoid, statements were taken from Briggs Scotland.

¹²⁸ See record of interview of Mr A, a senior manager of Briggs Scotland, dated 11 September 2002.

¹²⁹ The 'Register' (set out at paragraphs 54 - 56 above) was kept by Briggs Scotland and was a list of certain contracts which were subject to bid rigging between 1993 and 2001. The contractor seeking cover was identified in the Register by a tick in the column labelled “D” for Durastic/Briggs Scotland, “P” for Pirie or “L” for Lenaghen. A photocopy of the Register (the original no longer exists) was produced by Mr A.

¹³⁰ See paragraphs 54 - 56 above.

¹³¹ Mr B prepared an internal memorandum, dated 1 February 2002, which detailed, “The definitive list of those anti-competitive issues that had occurred from January 2000 to the present date.”

¹³² Documentation produced by Pirie on 2 December 2002.

¹³³ See footnote 87 above.

asphalt department, could recall, this contract was subject to collusion. It is noted that Pirie had been the contractor seeking cover and that cover prices had been provided by Briggs Scotland and Lenaghan. The document shows that a quote of £31,983.16 was submitted on 25 April 2001.

100. Evidence provided by leniency applicant Walker (Statement of Mr John Thomson, a senior manager of Walker. Mr Thomson stated when asked to provide his explanation of the fax set out at paragraph 95 above that, "Walker submitted a bid for this contract although it was not interested in securing the contract. The bid was on the basis of the prices provided by Pirie so that Pirie would be better placed to win the contract."¹³⁴

v. Elderpark Clinic, Glasgow

Facts

101. The Greater Glasgow NHS Trust invited contractors to tender for the main contract which consisted of various works at the Elderpark Clinic, Glasgow. Clark Contracts Ltd. ('Clark Contracts') and Alexander Braidwood Ltd. were two of the contractors invited to tender.¹³⁵ Alexander Braidwood Ltd. sub-contracted the roofing element of the contract and sent invitations to tender to Walker and Pirie on 13 December 2001.¹³⁶ The tender return date was 9 January 2002.
102. Clark Contracts selected various contractors from its approved list of asphalt contractors to tender for the roofing element of the contract. Invitations to tender were sent on 13 December 2001, with a return date of 9 January 2002, to Durastic, George Brolly, Ttarr Roofing and Pirie.
103. The only tender received by Clark Contracts as a result was from Pirie, which submitted a tender price of £14,028.00 on 17 December 2001.¹³⁷
104. Clark Contracts later also requested another roofing contractor, Braedale Roofing Ltd, to provide a price after the initial tender exercise because of the poor response received at the tender stage on 9 May 2002. This was after Clark Contracts had been awarded the main contract.¹³⁸ Braedale Roofing's quote was based on a three layer felt system in lieu of asphalt. Its quote was ultimately disregarded as the proposed system was not acceptable to the Greater Glasgow NHS Trust.

¹³⁴ See e-mail from Colin Miller of Biggart Baillie, dated 28 July 2004.

¹³⁵ See letter from Alexander Braidwood to sub-contractors, Pirie and Walker dated 13 December 2001. Information found by OFT's officials during a section 28 visit to Walker's and Pirie's premises on 20 November 2002. Ref PJS 0/14 and AH/10

¹³⁶ *Ibid.*

¹³⁷ See letter from Pirie to Clark Contracts, dated 17 December 2001. Letter produced by Clark Contracts in response to OFT's s 26 Notice, dated 27 March 2003.

¹³⁸ Statement provided by Clark Contractors in response to OFT's section 26 Notice, dated 27 March 2003.

105. Clark Contracts sent Pirie a letter accepting its bid on 28 May 2002.¹³⁹ Clark Contracts used this bid in its tender for the main contractor contract. The contractors invited to tender were not requested to sign anti-collusion certificates.¹⁴⁰

Evidence of agreement and/or concerted practice

106. Evidence by leniency applicant Walker. (Statement of Mr James Allan Thomson¹⁴¹ a senior manager of Walker). Mr James Allan Thomson confirmed that the original invitation to tender from Alexander Braidwood to Walker, dated 13 December 2001,¹⁴² regarding the Elderpark Clinic contract, had the following manuscript note on the first page which appears to have been written in pencil and rubbed out:

"m/a Pirie"

107. The original invitation to tender and associated documentation from Alexandra Braidwood to Walker consisted of 11 pages. Alexander Braidwood requested that Walker complete the enclosed Bill of Quantities and return it by 9 January 2002. The Bill of Quantities has been completed by Walker. The total figure quoted was £15,781.25.¹⁴³

108. Fax sent from Jim Stables of Pirie to John Thomson of Walker, dated 8 January 2002. The fax header sheet which notes that the fax was sent at "10.56am" states:¹⁴⁴

"SUBJECT: ELDERPARK CLINIC. GLASGOW

Attached please find copy of our quotation for the **Mastic Asphalt** work at the above site, as requested.

As discussed, these are **OUR RATES**.

Thanks for your assistance.
Regards

Jim"

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

¹⁴¹ See statement of Mr James Allan Thomson, a senior manager of Walker provided in compliance with section 28 (2)(b) of the Act.

¹⁴² Letter found by OFT officials during a section 28 visit to Walker's premises on 20 November 2002. REF AH/10

¹⁴³ This fax was found by OFT officials on a section 28 visit to Walker's premises on 20 November 2002. Ref AH/10

¹⁴⁴ This fax was found by OFT officials on a section 28 visit to Walker's premises on 20 November 2002. Ref CET/9

109. The fax consists of two pages. The second page contains a total figure of Pirie's quotation £14,028.08 and a detailed breakdown of this total figure.
110. Evidence by leniency applicant Walker. (Statement of Mr John Thomson, a senior manager of Walker). Mr Thomson, a senior manager of Walker, said in his statement to the OFT in relation to the fax set out at paragraph 108 above that, "I think that Walker were asked to submit a cover price by Pirie by fax dated 8 January 2002. Pirie specified that the rates attached to the fax are its own rates. Walker obliged and submitted the tender with rates above those quoted by Pirie."¹⁴⁵
111. Evidence by leniency applicant Pirie.¹⁴⁶ On 2 December 2002, Pirie sent a covering letter to the OFT attaching a list of all contracts quoted from 1 March 2000. The relevant member of staff for each department subsequently examined the list and endeavoured to remember where any collusion might have taken place. In connection with the Elderpark Clinic contract, as far as Mr D,¹⁴⁷ an estimator of Pirie in the mastic asphalt department, could recall, this contract was subject to collusion. It is noted that Pirie had been the contractor seeking cover and that a cover price had been provided by Briggs Scotland. The document shows that a quote of £14,028.08 was submitted on 17 December 2001.

vi. Tibetan Centre – Phase I Roof Contract

Facts

112. Samye Project Development Ltd. ('Samye') appointed P Haywood & Sons ('Haywood') as the main contractor for the replacement of the roof at the Kagyu Samye Ling Tibetan Centre Temple. From the documentation held by the OFT, it appears that there were two tenders issued for this project. The first tender exercise for the Kagyu Samye Ling Tibetan Centre Temple (Phase I Roof contract) was carried out in April/May 2000.
113. David Cameron of Samye had discussed the roofing works with Jim Stables of Pirie prior to the roofing work being tendered and as a result David Cameron recommended that invitations to tender should be sent to Pirie and Walker.¹⁴⁸ Pirie and Walker were invited to tender for Phase I Roof contract by the quantity surveyors, Love Jenkins Associates Limited ('Love Jenkins Associates') on 18 and 19 April 2000 respectively, with a return date of 5 May 2000.¹⁴⁹ Love Jenkins Associates was subsequently appointed as the quantity surveyors.

¹⁴⁵ See report prepared by Mr John Thomson, a senior manager of Walker, dated 20 January 2003.

¹⁴⁶ Documentation produced by Pirie on 2 December 2002.

¹⁴⁷ See footnote 87 above.

¹⁴⁸ See statement of Charlie Love, Managing Director of Love Jenkins Associates, dated 26 March 2003.

¹⁴⁹ See the letters from Love Jenkins Associates to Walker and Pirie, dated 18 and 19 April 2000 respectively produced by Charlie Love, Managing Director, Love Jenkins Associates.

114. Haywood was required to appoint the contractor who won this tender.¹⁵⁰ Love Jenkins Associates required all contractors responding to an invitation to tender for Phase I Roof contract to complete a non-collusion certificate, a so-called 'Certificate of Bona Fide Tender'.¹⁵¹ It was envisaged that if it were discovered that contractors had colluded, Love Jenkins Associates would re-tender, if time allowed.¹⁵² They would, however, also report it to the client and suggest that they would inform the relevant trade association.

115. The following bids were received for the mastic asphalt and related aspects of the Phase I Roof contract:¹⁵³

Contractor	Bid received (£)	Date received
Pirie	52,286.68	5 May 2000
Walker	55,820.85	4 May 2000

116. According to the documentation found by the OFT, there were five separate elements relating to various works required for this contract.¹⁵⁴ Pirie was awarded the sub-contractor contract and Love Jenkins Associates drew up a sub-contract agreement between Haywood and Pirie which the parties entered into on 5 July 2000.

¹⁵⁰ See documentation produced by Charlie Love, Managing Director of Love Jenkins Associates, as part of his witness statement, dated 26 March 2003.

¹⁵¹ The Certificate of Bona Fide Tender states; "The essence of selective tendering is that the client shall receive bona fide competitive tenders from all those tendering. In recognition of this principle, we certify that this is a bona fide tender, intended to be competitive and that we have not fixed or adjusted the amount of the tender in accordance with any agreement or arrangement with any other person. We also certify that we have not done and we undertake that we will not do at any time before the time and date specified for the return of this tender any of the following acts:-

- a) Communicate the amount or approximate amount of this tender to any person other than to communicate the approximate amount in confidence as necessary to ascertain the cost of the insurance premiums required to the preparation of this tender.
- b) Enter into any agreements or arrangements with any person that he shall refrain from tendering or as to the amount of any tender submitted.
- c) Offer or pay or give or agree to pay or give any sum of money or valuable consideration directly or indirectly to any person for doing or having done or having caused to be done in relation to any other tender or proposed tender for this work any act or thing of the sort described above.

In this certificate the word "person" includes any persons or any body or association corporate or unincorporated and "any agreement or arrangement" includes any such transaction, formal or informal and whether legally binding or not."

The OFT understands that similar certificates of bona fide tender were required for the Elderpark Clinic contract, see paragraph 105 above.

¹⁵² See footnote 148 above.

¹⁵³ See footnotes 148-150 above.

¹⁵⁴ These were identified as: Bill No 1 – Preliminaries, Bill No 2 – Preambles, Bill No 3 – Measured Works, Bill No 4 – Boiler House and Bill No 5 – Generator House. Documentation found by OFT officials during a section 28 visit to Pirie's premises. Ref PJS/016. See also documentation provided by Charlie Love, Managing Director of Love Jenkins Associates as part of his witness statement taken on 26 March 2003.

Evidence of agreement and/or concerted practice

117. Fax sent from Jim Stables, Pirie to John Thomson, Walker, dated 21 April 2000. The fax header sheet which notes that it was sent at "15.50pm" states:¹⁵⁵

"Subject: Samye Ling Tibetan Centre, Eskdalemuir

Attached please find copy of our quotation for the Mastic Asphalt work at the above location, as discussed. We have included Page Nos 3J/1 & 3J/2 only at this stage. Page No 3J/3 will be forwarded as soon as material prices for the powder coated aluminium flashings are to hand.

As discussed, these are **our rates**.

Thanks for your assistance.

Jim"

118. The fax consists of three pages, the fax header sheet plus a full breakdown of the total tender figure of £52,286.68. Pirie's figures have been crossed out and replaced with higher figures in manuscript by Walker in the sum of £55,820.85.¹⁵⁶

119. Fax sent from Jim Stables of Pirie to John Thomson of Walker, dated 10 May 2000. The fax header sheet which notes it was sent at 12.09 states:¹⁵⁷

"Subject: Samye Ling Tibetan Centre, Eskdalemuir

Attached please find copy of our quotation for the Mastic Asphalt work at the above location, as requested. Please note the alterations to the item description.

Thanks again for your co-operation.

Jim"

120. The fax header states that the fax consisted of two pages. The rate quoted was £1,542.30.
121. Evidence by leniency applicant Walker. (Statement of Mr John Thomson, a senior manager of Walker). Mr Thomson said in his statement of 20 January 2003 in connection with the Kagyu Samye Ling Tibetan Centre Temple – Phase I project that, "There were two tender phases for this job. Phase I took place in April 2000. ... WG Walker were asked to quote for

¹⁵⁵ This fax was found by OFT officials on a section 28 visit to Walker's premises on 20 November 2002. Ref CET/24

¹⁵⁶ See footnote 153 above and report dated 20 January 2003 prepared by Mr John Thomson, a senior manager of Walker as part of Walker's leniency application.

¹⁵⁷ This fax was found by OFT officials on a section 28 visit to Walker's premises on 20 November 2002. Ref CET/25.

this job by Pirie by fax dated 21 April 2000 and by fax dated 10 May 2000. Pirie specifies that [sic] this is their own rate and have asked WG Walker to quote the higher rate. ...I have inflated various figures. ...Pirie quoted £52,286.68 and WG Walker quoted £55,820.85. WG Walker were not interested in obtaining this job. I understand that Pirie won the job.”¹⁵⁸

122. Evidence by leniency applicant Pirie.¹⁵⁹ On 2 December 2002, Pirie sent a covering letter to the OFT attaching a list of all contracts quoted from 1 March 2000. The relevant member of staff for each department subsequently examined the list and endeavoured to remember where any collusion might have taken place. In connection with the Kagyu Samye Ling Tibetan Centre Phase I - Roof contract, as far as Mr D, an estimator of Pirie in the mastic asphalt department, could recall, this contract had been subject to collusion. It is noted that Pirie had been the contractor seeking cover and that cover prices had been provided by Briggs Scotland, Walker and Lenaghan. A quote of £52,286.68 was submitted on 3 May 2000.

123. Evidence of leniency applicant Lenaghan. (Taped interview of Mr Stuart Lenaghan, a senior manager of Lenaghan).¹⁶⁰ Mr Stuart Lenaghan, senior manager of Lenaghan stated, in response to a question from OFT's officials regarding this contract that, “I believe Pirie's had done the leg-work on that one and we were asked to cover that price for Pirie.” Mr Stuart Lenaghan subsequently advised that, “I have no knowledge about whether we supplied a cover quote for the works on Samye Ling Centre as it was at least four years ago and we have no record of the Contract”.¹⁶¹

vii. Tibetan Centre – Phase II Internal Fit-Out

Facts

124. Samye appointed Haywood as the main contractor for the replacement of the roof at the Kagyu Samye Ling Tibetan Centre Temple. From the documentation held by the OFT, it appears that there were two tenders issued for this project. The second tender exercise for the Kagyu Samye Ling Tibetan Centre Temple (Phase II Internal Fit Out contract) was carried out in January 2002.

125. For the second tender exercise (Phase II Internal Fit Out contract), Postlethwaite Building and Construction ('Postlethwaite') and Melville Dundas sent invitations to tender to Pirie on 8 January 2002 and ¹⁶²14 January 2002 respectively. It appears that Walker was also invited to

¹⁵⁸ See report dated 20 January 2003 prepared by Mr John Thomson, a senior manager of Walker on as part of Walker's leniency application.

¹⁵⁹ Documentation produced by Pirie on 2 December 2002.

¹⁶⁰ See taped interview of Mr Stuart Lenaghan, a senior manager of Lenaghan, dated 13 May 2003.

¹⁶¹ See letter from Mr Stuart Lenaghan, a senior manager of Lenaghan to the OFT, dated 23 July 2004.

¹⁶² Documents found by OFT officials on a section 28 visit to Pirie's premises on 20 November 2002. Ref PJS/016

tender for Phase II Internal Fit Out contract (which also involved certain further mastic asphalt roofing works) by Robinson & Davidson Limited, as it sent Robison & Davidson Limited a bid in response to its enquiry dated 15 January 2002.

126. According to the tender documentation sent to Pirie by Postlethwaite on 8 January 2002, Pirie had calculated the cost of the further roofing works for the Boiler House and Generator House to be £9,525.40.¹⁶³ There is no documentation to establish the bid Walker submitted.

Evidence of agreement and/or concerted practice

127. Fax sent from Jim Stables of Pirie to John Thomson of Walker, dated 14 January 2002. The fax header sheet which notes that it was sent at 12.50 states:¹⁶⁴

“Subject: SAMYE LING CENTRE, ESKDALEMUIR

Attached please find copy of our quotation for the **Mastic Asphalt** work at the above site as discussed.

As usual, please note these are **OUR RATES**.

Enquiry also received from:

**Postlethwaite
Building Construction
Moor Edge
Rockcliffe
Carlisle
Cumbria
CA6 4BS**

Thanks
Jim”

128. The fax header sheet states that it consists of three pages. The total breakdown was quoted as £9,525.40.
129. Evidence by leniency applicant Walker. (Statement of Mr John Thomson, a senior manager of Walker). Mr Thomson said in his statement of 20 January 2003 in connection with the Kagyu Samye Ling Tibetan Centre Temple – Phase II project that, “There were two tender phases for this job. [...] Phase II took place in January 2002. ... WG Walker were asked to submit a cover price by Pirie by fax dated 14 January 2002.Again, Pirie have specified their own rates. Pirie's quote is £9,525.40. WG Walker inflated the rate and submitted a higher price by letter dated 15 January 2002... . I cannot remember what price I quoted. ...I understand Pirie got this job. WG Walker were not interested in obtaining this job.

¹⁶³ Document found by OFT officials during a section 28 visit to Pirie's premises on 20 November 2002. Ref PJS 016.

¹⁶⁴ This fax was found by OFT officials on a section 28 visit to Walker's premises on 20 November 2002. Ref CET/8.

Phase II was essentially a run on from Phase I. The job was too remote for WG Walker to be interested in with regard to the price involved.”¹⁶⁵

130. Evidence by leniency applicant Pirie.¹⁶⁶ With regard to the Kagyu Samye Ling Tibetan Centre Phase II – Internal Fit Out contract, Mr D, noted that Pirie had been the contractor seeking cover and that cover prices had been provided by Briggs Scotland, Walker and Lenaghan. The document shows that a quote of £9,525.40 was submitted on 14 January 2002.
131. Evidence of leniency applicant Lenaghan. (Taped interview of Mr Stuart Lenaghan, a senior manager of Lenaghan).¹⁶⁷ Mr Stuart Lenaghan, senior manager of Lenaghan stated, in response to a question from OFT's officials regarding this contract that, “I believe Pirie's had done the leg-work on that one and we were asked to cover that price for Pirie.” Mr Stuart Lenaghan subsequently advised that, “I have no knowledge about whether we supplied a cover quote for the works on Samye Ling Centre as it was at least four years ago and we have no record of the Contract”.¹⁶⁸

viii. BT Extension, Thistle Shopping Centre, Stirling

Facts

132. Standard Life Assurance Co ('Standard Life') carried out a tender exercise for various works at the BT Extension at the Thistle Shopping Centre¹⁶⁹ in Stirling.¹⁷⁰ Standard Life specified that Permaphalt polymer modified asphalt, manufactured by Permanite should be used for the roofing element of the contract.
133. A number of main contractors were interested in bidding for the main contract. These companies included Melville Dundas Ltd.¹⁷¹, Sir Robert McAlpine Ltd.¹⁷² Kvaerner Construction Ltd.¹⁷³ and HBG Construction Ltd.

¹⁶⁵ See report dated 20 January 2003 prepared by Mr John Thomson, a senior manager of Walker on as part of Walker's leniency application.

¹⁶⁶ Documentation produced by Pirie on 2 December 2002.

¹⁶⁷ See taped interview of Mr Stuart Lenaghan, a senior manager of Lenaghan, dated 13 May 2003.

¹⁶⁸ See letter from Mr Stuart Lenaghan, a senior manager of Lenaghan to the OFT, dated 23 July 2004.

¹⁶⁹ The actual contract was “Retail at BT Extension, The Thistle Shopping Centre, Stirling. See contract documentation found by OFT officials during a section 28 visit to Pirie's premises on 20 November 2002. Ref REA/6

¹⁷⁰ See documentation relating to the contract specification found by OFT officials during a section 28 visit to Pirie's premises on 20 November 2002. Ref REA/6

¹⁷¹ See documentation found by OFT officials during a section 28 visit to Pirie's premises on 20 November 2002. Ref REA/7

¹⁷² See documentation found by OFT officials during a section 28 visit to Lenaghan's premises on 20 November 2002. Ref KB/10

¹⁷³ See documentation found by OFT officials during a section 28 visit to Lenaghan's premises on 20 November 2002. Ref REA/8

('HBG Construction'). In the context of the preparation of its tenders, these companies sent out invitations to tender to a number of roofing sub-contractors, including Ttarr Roofing¹⁷⁴, Bonningtons¹⁷⁵, Scottish Roofing Services, Pirie, Durastic and Lenaghan¹⁷⁶, for the roofing element of the main contract from around September 2000.¹⁷⁷

134. HBG Construction was subsequently appointed as the main contractor.¹⁷⁸

135. As HBG Construction does not carry out roofing works itself, it sub-contracted the roofing element. The documentation on the tender process has been destroyed, which John Bacchetti, Managing Surveyor for HBG Construction states is normal practice upon completion of the tender process.¹⁷⁹ Invitations to tender were sent by HBG Construction to Durastic, Pirie, Scottish Roofing Services, Ttarr Roofing and Bonningtons.¹⁸⁰

136. The tender bids received by HBG Construction were:¹⁸¹

Contractor	Bid received (£)	Date received
Durastic ¹⁸²	74,950	unknown
Pirie	78,675	unknown
Scottish Roofing Services	46,607	unknown
Ttarr Roofing	45,611	unknown
Bonningtons	No bid was received	N/A

137. Scottish Roofing Services and Ttarr Roofing's bid were based on a traditional mastic asphalt roofing solution. HGB Construction used Scottish Roofing Services bid for the roofing element of its main contractor bid to Standard Life. However, Scottish Roofing Services' bid was not based on the modified polymer asphalt solution, Permaphalt, specified by Standard Life. HGB Construction ultimately awarded the contract to Durastic on 30 July 2001, as it submitted the lowest bid with the required specification.¹⁸³

¹⁷⁴ See witness statement of John Bacchetti, Managing Surveyor for HBG Construction, dated 24 February 2003.

¹⁷⁵ *Ibid.*

¹⁷⁶ See documentation found by OFT officials during a section 28 visit to Lenaghan's premises on 20 November 2002. Ref BG/11

¹⁷⁷ Documents found by OFT officials during a section 28 visit to Lenaghan's and Pirie's premises on 20 November 2002.

¹⁷⁸ See footnote 174 above.

¹⁷⁹ *Ibid.*

¹⁸⁰ See record of bids received, produced by John Bacchetti, Managing Surveyor for HBG Construction, dated 24 February 2003. Ref JB1

¹⁸¹ See footnote 174 above.

¹⁸² Durastic is a trading style of Briggs. See paragraph 4 above.

¹⁸³ See footnote 174 above

Lenaghan also sent a bid to Sir Robert McAlpine in the sum of £78,930.10 less 2.5% plus VAT on 29 September 2000.

Evidence of agreement and/or concerted practice

138. Evidence by leniency application Ruberoid. Undated document produced by Briggs. The following is noted:
- “Enquiry also received for Thistle Centre – Presume these are booked in June. Charlie will lay off.”¹⁸⁴
139. Evidence by leniency applicant Ruberoid.¹⁸⁵ (Record of Interview of Mr A, a senior manager of Briggs Scotland). This contract was on the Register,¹⁸⁶ which shows a tick in the column for Durastic (Briggs Scotland). Accordingly, from the explanation given by Mr A,¹⁸⁷ this would indicate that Briggs Scotland was the contractor seeking cover and cover prices would have been provided by the other two contractors involved in the arrangement, Pirie and Lenaghan.¹⁸⁸
140. Evidence by leniency applicant, Ruberoid. Mr A also completed a questionnaire produced as a result of an internal audit conducted by Briggs' legal representatives in connection with this contract. Mr A noted that Lenaghan and Pirie had given cover prices to Briggs Scotland in September 2000 and that the value of the contract was £73,000.¹⁸⁹
141. Evidence by leniency applicant Ruberoid. (Memorandum of Mr B, a senior manager of Briggs). Mr B, a senior manager of Briggs, prepared an internal memorandum setting out the contracts that had been subject to collusion. This information had been compiled from interviews with all managers. The memorandum noted for a contract identified as “Sept 00 Thistle Centre” indicating that Briggs Scotland was the contractor seeking cover and that cover prices had been provided by Pirie and Lenaghan.¹⁹⁰

¹⁸⁴ Document produced by Briggs as part of the leniency application made by Ruberoid. Ref (B) BG/4

¹⁸⁵ Briggs Scotland/Durastic form part of the economic entity ultimately controlled by Ruberoid. As part of the leniency application made by Ruberoid, statements were taken from Briggs.

¹⁸⁶ The Register (set out at paragraphs 54 - 56 above) was kept by Briggs Scotland and was a list of certain contracts which were subject to bid rigging between 1993 and 2001. The contractor seeking cover was identified in the Register by a tick in the column labelled D for Durastic/Briggs Scotland, P for Pirie or L for Lenaghan. A copy of the Register (the original no longer exists) was produced by Mr A.

¹⁸⁷ See paragraphs 54 - 56 above.

¹⁸⁸ See witness statement of Mr A, a senior manager of Briggs Scotland, dated 11 September 2002.

¹⁸⁹ The questionnaire was completed by Mr A (a senior manager of Briggs Scotland) as part of an internal investigation by Briggs, sent by Briggs' legal representatives (Hammond Suddards Edge) to the OFT attached to a covering letter dated 12 April 2002.

¹⁹⁰ See memorandum of Mr B, a senior manager of Briggs, dated 1 February 2002.

142. Evidence by leniency applicant Pirie.¹⁹¹ On 2 December 2002, Pirie sent a covering letter to the OFT attaching a list of all contracts quoted from 1 March 2000. The relevant member of staff for each department subsequently examined the list and endeavoured to remember where any collusion might have taken place. In connection with the Thistle Centre contract, as far as Mr D,¹⁹² an estimator of Pirie in the mastic asphalt department, could recall, this contract was subject to collusion. It is noted that Briggs Scotland had been the contractor seeking cover for a contract identified as, "Stirling Thistle Centre BT Retail Extension Shop". Mr D also noted that cover prices had been provided by Pirie, Lenaghan and Walker. The document shows that a quote of £76,833.28 was submitted on 1 October 2000.

ix. BBC Studios 4, 5 and 6, Glasgow

Facts

143. Clark Contracts was the main contractor for the roofing works to studios 4, 5 and 6 of the BBC Studios, Queen Margaret Drive, Glasgow. A letter from Clark Contracts to Walker dated 12 November 2001, found by OFT officials during a section 28 visit to Walker's premises on 20 November 2002, invited Walker to tender for this contract. The tender return date was 21 November 2001.¹⁹³

144. No other documentary evidence in relation to the tender process has been provided.

Evidence of agreement and/or concerted practice

145. Fax from Jim Stables of Pirie to John Thomson of Walker dated 16 November 2001. The fax header sheet, which notes that it was sent at "09.50am" states:¹⁹⁴

"SUBJECT: BBC GLASGOW, STUDIOS 4,5,6.

Attached please find copy of our quotation for the **Mastic Asphalt** work at the above location, as discussed. **These are our prices**, first quoted on **10 July 2001**.

Trusting you find this of assistance.

Regards

Jim"

¹⁹¹ Documentation produced by Pirie on 2 December 2002.

¹⁹² See footnote 87 above.

¹⁹³ See documentation found by OFT officials during a section 28 visit to Lenaghan's premises on 20 November 2002. Ref AH/8.

¹⁹⁴ This letter was found by OFT officials on a section 28 visit to Walker's premises on 20 November 2002. Ref CET/13.

146. The fax consists of four pages and gives a total quote of £6,543.05 and a breakdown of that quote.
147. Undated document entitled "Roof over Studios 4,5 and 6 BBC Resources, Queen Margaret Drive, Glasgow, GWS/VMCM/MB/41158". The document consists of three pages and is almost identical to the document attached to the fax set out in paragraph 145 above. The only difference being that some of the figures in the document above have been crossed out and replaced with inflated figures. The total rate stated was £7,550.00.¹⁹⁵
148. Evidence by leniency applicant Pirie. On 2 December 2002, Pirie sent a covering letter to the OFT attaching a list of all contracts quoted from 1 March 2000. The relevant member of staff for each department subsequently examined the list and endeavoured to remember where any collusion might have taken place. In connection with the BBC Studios contract, as far as Mr D,¹⁹⁶ an estimator of Pirie in the mastic asphalt department, could recall, this contract was subject to collusion. It is noted that Briggs Scotland had been the contractor seeking cover and that cover prices had been provided by Pirie and Walker. The document shows that a quote of £6,543.05 was submitted on 10 July 2001.
149. Evidence by leniency applicant Walker. (Statement of Mr John Thomson, a senior manager of Walker). Mr Thomson stated that, "WG Walker had been asked to quote for this job but we were not able to take on the job at the time. We phoned Pirie to suggest that they handle the job and said that we would submit a cover price if they wanted us to. WG Walker were indeed asked by Pirie to submit a cover price in relation to this job by Pirie's fax dated 16 November 2001. ... Pirie specified that the prices attached to their fax were their own prices and WG Walker had been asked to quote a higher price. Pirie's quote was £6,543.05. ...WG Walker's quote totalled £7,550.00. This is clearly higher than Pirie's bid. I do not know whether Pirie got the job in the end, or even if it went ahead."¹⁹⁷

x. Clydeaway Skypark, Glasgow

Facts

150. The OFT has only been able to obtain limited documentation on the tender process for this contract. A letter sent from Walker to Laing Management (Scotland) Ltd ('Laing Management'), dated 26 March 2001, enclosing a copy of its bid for the roofing works, and copied to Melville Dundas and Lilley Construction, indicates that Laing Management, Melville Dundas and Lilley Construction were bidding for the main contractor contract.

¹⁹⁵ This document was found by OFT officials on a section 28 visit to Walker's premises on 20 November 2002. Ref AH/9.

¹⁹⁶ See footnote 87 above.

¹⁹⁷ See report prepared by Mr John Thomson, a senior manager of Walker, dated 20 January 2003.

151. A letter addressed to Walker from Lilley Construction, dated 6 March 2001,¹⁹⁸ indicates that the main contractors were inviting sub-contractors to tender for the mastic asphalt roofing works required under the main contract in March 2001. Walker was requested to return its bid by 27 March 2001.¹⁹⁹

Evidence of agreement and/or concerted practice

152. Fax from Jim Stables of Pirie to John Thomson of Walker. The fax header sheet, which notes that the fax was sent at "11.45am" on 22 March 2001, states:²⁰⁰

"Subject: Clydeway Skypark, Finnieston, Glasgow

Attached please find copy of our quotation for the **Mastic Asphalt** work at the above location, as discussed. Please contact me by telephone in order that I might explain a couple important points.

As usual, these are **OUR RATES**.

Thanks

Jim"

153. The fax consists of three pages including the cover sheet. Page 2 is entitled "Bill No 6, Roof Coverings". The total rate quoted by Pirie was £25,280.00. Page 3 simply states "Q25 SLAB/BRICK/BLOCK/SETT/COBBLE PAVINGS. A handwritten manuscript note states "By others".

154. Letter sent from Walker to Laing Management, dated 26 March 2001.²⁰¹

"Roof extension to Clydeway Skypark, 8 Elliot Place, Glasgow

We thank you for your recent enquiry regarding works at the above and have pleasure in enclosing our priced Bill of Quantities herewith. If favoured with your order, same will have our best attention.

Yours faithfully

John C Thompson
Director

Manuscript note states: £27,759.70 + VAT"

¹⁹⁸ Document found by OFT officials during a section 28 visit to Walker's premises on 20 November 2002. Ref AH/11.

¹⁹⁹ Document found by OFT officials during a section 28 visit to Walker's premises on 20 November 2002. Ref AH/2.

²⁰⁰ This fax was found by the OFT officials on a section 28 visit to Walker's premises on 20 November 2002. Ref CET/11.

²⁰¹ Letter found by OFT officials during a section 28 visit to Walker's premises on 20 November 2002. Ref AH/11.

155. Evidence by leniency applicant Walker. (Statement of Mr John Thomson, a senior manager of Walker). When asked to comment on the fax set out at paragraph 152 above, Mr Thomson stated that, "this job related to mastic asphalt. WG Walker were asked by Pirie to submit a cover price by Pirie's fax dated 22 March 2002²⁰². ... Pirie explained that the rates attached to their fax are their own rate and request WG Walker to submit higher rates. Pirie's quote is £25,280.00. WG Walker were not interested in getting this job as it was too big for us to handle. ... WG Walker's quote, which is higher than that quoted by Pirie was for £27,759.70.²⁰³... I understand that Pirie won this job".
156. Evidence by leniency applicant Pirie.²⁰⁴ On 2 December 2002, Pirie sent a covering letter to the OFT attaching a list of all contracts quoted from 1 March 2000. The relevant member of staff for each department subsequently examined the list and endeavoured to remember where any collusion might have taken place. In connection with the Clydeaway Skypark contract, as far as Mr D,²⁰⁵ an estimator of Pirie in the mastic asphalt department, could recall, this contract was subject to collusion. It is noted that Pirie had been the contractor seeking cover and that a cover price had been provided by Briggs Scotland. The document shows that a quote of £25,280 was submitted on 20 March 2001.

xi. Glasgow College of Nautical Studies

Facts

157. James Barr, Chartered Surveyors and Planning Consultants, invited Durastic, Pirie and Walker to tender for the re-roofing works for the Glasgow College of Nautical Studies on 13 July 2001. The tender invitations had a return date of 3 August 2001. The Glasgow College of Nautical studies advised James Barr that only five contractors were approved to install Permanite products in Scotland and that one of those contractors must be used in order to obtain the Permanite guarantee.²⁰⁶ All three contractors returned the following bids on 3 August 2001:²⁰⁷

Contractor	Bid (£)
Durastic	125,951.42
Pirie	136,172.71

²⁰² The OFT notes that this date is clearly a typographical error, as it should refer to '2001'.

²⁰³ See report dated 20 January 2003 prepared by Mr John Thomson, a senior manager of Walker as part of Walker's leniency application.

²⁰⁴ Documentation produced by Pirie on 2 December 2002.

²⁰⁵ See footnote 87 above.

²⁰⁶ See statement of Alan E. Smith. Director of James Barr, dated 31 March 2003.

²⁰⁷ See documents produced by Alan E. Smith in connection with his witness statement, dated 31 March 2003. Tender Report – August 2001.

Walker	141,791.00
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158. James Barr reviewed the bids and noted that they were above the original budget allowances specified by the Glasgow College of Nautical Studies. However, this was due to the fact that a number of items had been included to establish the appropriate rates. James Barr advised that when these items were removed from Durastic's bid, which was the lowest bid submitted, the bid would be reduced to £95,102.02. James Barr recommended that Durastic's bid be accepted subject to the savings identified above.²⁰⁸
159. A Purchase Order form was subsequently sent to Durastic by Glasgow College of Nautical Studies on 3 September 2001. The price quoted was £119,937.02.²⁰⁹

Evidence of agreement and/or concerted practice

160. Evidence by leniency applicant, Ruberoid. (Record of Interview with Mr F,²¹⁰ a senior manager of Briggs Scotland). When asked which competing contractors he contacted, Mr F confirmed "Piries and Lenaghen". When questioned about what type of information was sent to other contractors once a site had been visited, Mr F stated "Enter area into book [Register], fax bill of quantities that would be our prices, other companies would then make their own. Or a phone call made with a total cost". When asked specifically about the Glasgow College of Nautical Studies, Mr F stated "I did that, we did not enter it into the book. I spoke to Pirie, Lenaghen and Walker".²¹¹
161. Evidence by leniency applicant, Ruberoid. Mr A also completed a questionnaire produced as a result of an internal audit conducted by Briggs' legal representatives in connection with this contract for Ruberoid's lawyers, Hammond Suddards Edge, in the course of its enquiries. Mr A noted that Lenaghen, Pirie and Walker had given cover prices to Briggs Scotland in August 2001 and that the value of the contract was £130,000.²¹²
162. Evidence by leniency applicant Ruberoid. (Memorandum prepared by Mr B, a senior manager of Briggs). Mr B, a senior manager of Briggs, prepared an internal memorandum setting out the contracts that had been subject to collusion. This information had been compiled from interviews with all managers. In the table Mr B notes, "August 2001, Nautical College" Briggs

²⁰⁸ See footnote 206 above.

²⁰⁹ Document produced by Briggs as part of Ruberoid's leniency application. Ref (B) JA1.

²¹⁰ See footnote 87 above.

²¹¹ See Record of Interview with Mr F, Contracts Manager of Briggs Scotland dated 12 September 2002.

²¹² Questionnaire prepared by Mr A, a senior manager of Briggs Scotland produced as a result of an internal audit conducted by Briggs' legal representatives and sent to the OFT attached to a covering letter dated 12 April 2002.

Scotland was the contractor seeking cover and cover prices were provided by Pirie, Lenaghan and Walker.²¹³

163. Evidence by leniency applicant Pirie.²¹⁴ On 2 December 2002, Pirie sent to the OFT a covering letter attaching a list of all contracts quoted from 1 March 2000. The relevant member of staff for each department subsequently examined the list and endeavoured to remember where any collusion might have taken place. In connection with the Glasgow College of Nautical Studies, as far as Mr D,²¹⁵ an estimator of Pirie in the mastic asphalt department, could recall, this contract was subject to collusion. It is noted that Briggs Scotland had been the contractor seeking cover and that a cover price had been provided by Pirie. A quote of £136,173.71 was submitted on 3 August 2001.

164. Evidence by leniency applicant Walker. (Statement of Mr John Thomson, a senior manager of Walker). In relation to this contract, Mr Thomson stated that, "this I think Pirie may have phoned me on behalf of Durastic. It was understood that Durastic was "in line" to win this job, because they had done all the maintenance work on the building over a period of years. ...I believe that Durastic got this job. WG Walker were not interested in getting this job as it was too big for us to handle. The value of the job was approximately £142,000"²¹⁶

xii. Hamilton Town Hall

Facts

165. The OFT has only been able to obtain limited documentation on the tender process for this contract. From the documents available it appears that Hamilton Town Hall required significant work to the library, including work to the roof comprising mastic asphalt roofing, insulation and finishes. Hamilton Town Hall tendered this project with several large contractors, including HBG Construction, Balfour Beatty, Melville Dundas, and Lilley Construction amongst others.²¹⁷

166. It appears that both HBG and Balfour Beatty wished to sub-contract the roof element and therefore requested tenders from Pirie. On 12 July 2002, Jim Staples of Pirie provided a quote to both contractors in the sum of £17,438.28.²¹⁸

²¹³ See memorandum of Mr B, a senior manager of Briggs, dated 1 February 2002.

²¹⁴ Documentation produced by Pirie on 2 December 2002.

²¹⁵ See footnote 87 above.

²¹⁶ See report dated 20 January 2003 prepared by Mr John Thomson, a senior manager of Walker as part of Walker's leniency application.

²¹⁷ See Mastic Asphalt Estimate Sheet for Hamilton Town Hall. Ref PJS/011.

²¹⁸ See letters from Jim Staples of Pirie dated 12 July 2002. Ref PJS/011.

167. On 5 July 2002, Melville Dundas requested a tender from Walker for the roof element of Hamilton Town Hall, with a return date of 17 July 2002.²¹⁹ Mr John Thomson of Walker subsequently sent a fax to Melville Dundas "inflating" the rates which Pirie had quoted, as set out in paragraph 245 below.

Evidence of agreement and/or concerted practice

168. Fax sent from Jim Staples of Pirie to John Thomson of Walker. The fax is dated 17 July 2002, and the fax header sheet, which notes that the fax was sent at "09:20" on 17 March 2002, states:²²⁰

"SUBJECT: TOWN HALL, HAMILTON

Attached please find copy of our quotation for the **Mastic Asphalt** work at the above site, as discussed. As usual, these are **OUR RATES**.

Thank you for your co-operation
Regards,

Jim"

169. The fax consists of four pages, including the cover sheet. Pages two to four are entitled "Asphalt Work", and the final page has the figure £17,438.28 written in manuscript.

170. Evidence by leniency applicant Walker. (Statement of Mr John Thomson, a senior manager at Walker).²²¹ When asked to comment on the fax set out in paragraph 168 above, Mr Thomson stated "I think Pirie initiated this activity by asking WG Walker for a cover price in relation to a job at Hamilton Town Hall by fax dated 17 July 2002. ... Pirie have stated that "these are OUR RATES". ... By stating that these are "our rates", Pirie is telling me that these are the rates which Pirie will quote themselves. WG Walker were not interested in getting this job. Accordingly I sent a fax to the client, Melville Dundas, simply inflating the rates which Pirie had quoted. On document CET/1 you can clearly see my handwriting deleting Pirie's figure and substituting WG Walker's inflated figure. ... I do not know whether Pirie got this job or not. It may be that the main contractor who would have asked for the tender to be submitted did not get the job itself."

171. Evidence by leniency applicant Pirie.²²² On 2 December 2002, Pirie sent the OFT a covering letter attaching a list of all contracts quoted from 1 March 2000. The relevant member of staff for each department subsequently examined the list and endeavoured to remember where any collusion might have taken place. Hamilton Town Hall is noted. However, details

²¹⁹ See tender documentation from Melville Dundas dated 5 July 2002. Ref PMK/12.

²²⁰ This fax was found by OFT officials during a section 28 visit to Walker's premises on 20 November 2002. Ref CET/1.

²²¹ See report dated 20 January 2003 prepared by Mr John Thomson, a senior manager of Walker as part of Walker's leniency application.

²²² Documentation produced by Pirie on 2 December 2002.

regarding the identity of who was awarded the contract and who provided cover prices have been left blank.

II. LEGAL AND ECONOMIC ASSESSMENT

A. Structure of this section

172. The background to the contracts and the evidence in relation to them on which the OFT relies have already been set out at paragraphs 57 to 171 above. This section begins by introducing the economic and legal framework against which the OFT has considered the evidence. The section then sets out, in relation to each infringement, the OFT's initial analysis of the evidence it relies on, the Parties' representations (if any) on that evidence and analysis and finally the OFT's conclusions in relation to the infringements having considered the Parties' representations.

173. It should be noted in relation to the evidence for all the infringements analysed below that, unless specifically stated, documents quoted and analysed in this section of the Decision in relation to the individual contracts were not created in relation to a leniency application.

B. Introduction

174. Section 2(1) of the Act prohibits any agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade within the UK²²³ and which have as their object or effect the prevention, restriction or distortion of competition within the UK, unless they are excluded or exempt in accordance with the provisions of Part I of the Act. The prohibition applies in particular to agreements, decisions or practices which directly or indirectly fix selling prices.²²⁴

175. Tendering procedures are designed to provide competition in areas where it might otherwise be absent. An essential feature of this system is that prospective suppliers prepare and submit tenders or bids independently. The OFT considers that any tenders submitted as the result of collusive activities which reduce the uncertainty of the outcome of the tender process are likely to have an appreciable effect on competition.²²⁵ As noted by the CAT in in *WM Roofing I*;

'We accept the submission of the OFT that submitting a cover-bid in these circumstances has an anti-competitive object or effect:

²²³ Under section 2(3) of the Act, subsection (1) applies only if the agreement, decision or practice is, or is intended to be, implemented in the United Kingdom, and under section 2(7), 'United Kingdom' means, in relation to an agreement which operates or is intended to operate only in a part of the United Kingdom, that part.

²²⁴ Section 2(2) of the Act.

²²⁵ See OFT Guideline 401 'Agreements and Concerted Practices', December 2004, paragraph 3.14.

- (a) it reduces the number of competitive bids submitted in respect of that particular tender;
- (b) it deprives the tenderee of the opportunity of seeking a replacement (competitive) bid;
- (c) it prevents other contractors wishing to place competitive bids in respect of that particular tender from doing so;
- (d) it gives the tenderee a false impression of the nature of competition in the market, leading at least potentially to future tender processes being similarly impaired.²²⁶

C. Application of Article 81 – effect on interstate trade

176. Following the entry into application of Council Regulation (EC) No 1/2003²²⁷ on 1 May 2004, the OFT is required when applying national competition law to agreements and/or concerted practices between undertakings which may affect trade between Member States also to apply Article 81 EC Treaty.²²⁸ Since the infringing agreements and/or concerted practices particularised in this Decision were all terminated before 1 May 2004, however, the OFT does not consider it is under a duty to apply Article 81 to the particular circumstances of this case. Accordingly, the OFT has not considered whether trade between Member States may have been appreciably affected, and this Decision relates solely to whether the Chapter I prohibition has been infringed.

D. Application of section 60 of the Act

177. Section 60(1) of the Act sets out the principle that, so far as it is possible (having regard to any relevant differences between the provisions concerned), questions arising in relation to competition within the UK are dealt with in a manner which is consistent with the treatment of corresponding questions arising in European Community law in relation to competition within the Community. In particular, under section 60(2) of the Act, the OFT must act (so far as it is compatible with the provisions of the Act) with a view to ensuring that there is no inconsistency with the principles laid down by the EC Treaty and the European Court and any relevant decision of the European Court. Under section 60(3) of the Act, the OFT must, in addition, have regard to any relevant decision or statement of the European Commission.

E. The relevant market

i. Introduction

178. The OFT is only obliged to define the market where it is impossible, without such a definition, to determine whether the agreement and/or concerted practice is liable to affect trade in the UK and has as its object or

²²⁶ *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4 ("*WM Roofing I*"), at paragraph 251.

²²⁷ OJ L 1, page 1

²²⁸ Article 3, Regulation 1/2003

effect the prevention, restriction or distortion of competition.²²⁹ No such obligation arises in this case because it involves agreements and/or concerted practices that had as their object the prevention, restriction or distortion of competition by way of price-fixing. Nevertheless, the OFT does define the market for the purposes of assessing the appropriate level of penalties.²³⁰

179. In order to define the market, one must first consider the competitive pressures faced by companies active in that market. A market definition is established by analysing the closest substitutes to the product that is the focus of the investigation. These products are usually the most immediate competitive constraints on the behaviour of the undertaking controlling the product in question.²³¹

180. The OFT is not bound by market definitions adopted in previous cases, either by itself or by other competition authorities. Sometimes earlier definitions can be informative when considering the appropriate market definition. However, although previous cases can provide useful information, the relevant market must be identified according to the particular facts of the case in hand.²³²

ii. The relevant product market

181. The process of defining the relevant market starts with the product that is the subject of the investigation. In this case, this is the supply of installation, repair, maintenance and improvement services for a variety of flat roof weatherproofing coverings.²³³

182. In an earlier decision in the roofing sector,²³⁴ the OFT considered, based on the information then available to it, that the appropriate market definition was the supply of repair, maintenance and improvement services for flat roofs. As the OFT has obtained further information relating to flat roofing products and services since making that decision, it is appropriate for the OFT to reconsider the relevant market definition.

²²⁹ Case T-62/98 *Volkswagen AG v European Commission* [2000] ECR II-2707, paragraph 230. and Case T-29/92 *SPO and Others v Commission* [1995] ECR II-289, paragraph 74. These cases refined the CFI's earlier position adopted in Case T-68/89 etc, *Societa Italiana Vetro SpA etc v Commission (Italian Flat Glass)* [1992] ECR II 1403, paragraph 159, drawing a distinction between cases involving abuse of dominance, where market definition is always a prerequisite to a finding of an infringement, and cases involving anti-competitive agreements, where the market need only be defined where it is impossible, without such a definition, to determine whether the agreement, the decision by an association of undertakings or the concerted practice at issue is liable to affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the common market.

²³⁰ See OFT Guideline 423, 'OFT's guidance as to the appropriate amount of a penalty' (December 2004).

²³¹ OFT Guideline 403 'Market Definition' (December 2004).

²³² *Ibid.*, at paragraph 5.7.

²³³ Ivan Jerram (see footnote 33 above) made a second statement to the OFT on 5 October 2004 ('Ivan Jerram's 2004 statement'): see paragraph 9 of Ivan Jerram's 2004 Statement.

²³⁴ See footnote 48, the West Midlands Roofing Decision.

183. As noted in the industry overview section at paragraphs 22 to 36 above, flat roof coverings fall into four broad categories: felt; single ply PVC membranes; mastic asphalt; and liquid applied roofing systems.
184. The contracts referred to in this Decision all relate to mastic asphalt coverings for flat roofs and other flat surfaces, which includes polymer modified mastic asphalt (also known as permaphalt).²³⁵ The OFT considers that the prices, characteristics and usages of traditional mastic asphalt and polymer modified mastic asphalt coverings are similar, and these types of covering are ultimately substitutable. On the supply side, the skills and equipment involved in supplying mastic asphalt and polymer modified mastic asphalt coverings overlap to a significant extent and many builders are able to install both.
185. It is noted that Lenaghen in its representations²³⁶ argues that polymer modified mastic asphalt should be a separate product market because it was only implicated in contracts relating to the supply of polymer modified mastic asphalt. However, the OFT does not analyse the market in terms of those contracts in which the Parties are implicated, but in relation to competitive pressures, as discussed in paragraph 179 above. According to the explanation in paragraph 30 above, the OFT considers that traditional mastic asphalt and polymer modified mastic asphalt coverings form part of a single product market.²³⁷
186. Representations were received from Briggs²³⁸ asserting that the relevant product market should cover all flat roofing coverings, including metal, single ply, felt, mastic asphalt and liquid applied roofing.
187. Representations were received by Pirie²³⁹ agreeing with the OFT's market definition and Walker made no representations at all.
188. The OFT is of the view that there are significant differences between the characteristics and usages of mastic asphalt on the one hand and felt/single ply coverings on the other. Mastic asphalt coverings differ from felt/single ply coverings in a number of ways:²⁴⁰
- Unlike felt/single ply, which are pre-formed sheet materials, the installation of mastic asphalt involves the spreading of hot molten material. It requires specialist skills which are learned by long apprenticeships and training and which are very different to the

²³⁵ See paragraph 28 to 30 above.

²³⁶ Representations of Lenaghen, dated 5 January 2005, in response to the Statement of Objections.

²³⁷ See the roofing contracting services industry in the UK – Overview, paragraphs 28 to 30 above.

²³⁸ Representations of Briggs in response to the Statement of Objections, dated 21 December 2004.

²³⁹ Paragraph 3 of Pirie's written representations dated January 2005, in response to the Statement of Objections.

²⁴⁰ See Ivan Jerram's 2004 statement.

more rapidly assimilated skills required for the installation of sheet materials.

- Mastic asphalt is substantially heavier per square metre of roof covered than felt or single ply coverings. For example a 20mm thickness of asphalt weighs around 46 kg/m² whereas self-finished high performance felt roofing is likely to weigh less than around 10 to 12 kg/m². A flat roof intended to receive mastic asphalt coverings requires a supporting structure able to bear the considerable additional load.
- The average service life of mastic asphalt flat roof coverings of 40 to 50 years is approximately double that of the average service life of felt/single ply solutions.
- Single ply and felt coverings are not usually designed to be trafficked other than, for example, for occasional maintenance works or emergency exit routes. Conversely, mastic asphalt roofs incorporating paving quality material as a top layer provide a durable hardwearing surface able to withstand vehicular and pedestrian traffic. For this reason many rooftop car parks and similar structures have mastic asphalt coverings.²⁴¹

189. The OFT has considered Briggs' representation²⁴² that mastic asphalt and felt/single ply are substitutable from a demand side perspective because an architect is at liberty to design a flat roof with the full range of coverings at his disposal and at the point of design no roofing material is considered to be too expensive. Competition between suppliers of flat roofing services takes place not at the point of design but at a much later stage of the process, when tenders are sought for implementation of a particular part of that design. Competition is even further removed from the point of design in the case of maintenance and replacement, which accounted for around 50 per cent of the total roofing contract industry in 2003.²⁴³

190. Moreover, the OFT understands that the skills and the equipment required for mastic asphalt installations are quite different and builders need extensive training over several years, and access to specialised equipment (such as melting and/or heating equipment) to undertake mastic asphalt works - which would not allow installers of mastic asphalt flat roof covering services to switch to offering felt/single ply installation services (to the extent that they do not yet offer such services) at relatively short notice. Although training and qualifications may also be obtained in relation to felt/single ply roofing, the qualifications for mastic asphalt and felt/single ply are different, so that a roofer qualified in one type of covering would not be readily able to switch to the other without further training.

²⁴¹ See footnote 233 above.

²⁴² Paragraph 3.1(1) of Briggs' written representations dated 21 December 2004.

²⁴³ See paragraph 33 above.

191. From a pricing perspective, Briggs' representations note that "a small but significant change in the price of ply will shift demand to felt and so on".²⁴⁴ However, no evidence has been provided in relation to the relative prices of mastic asphalt on the one hand, and felt/single ply and other roofing materials, on the other hand.
192. Therefore, when looking at demand side substitutability, it appears that the characteristics and usage of mastic asphalt installations for flat roof coverings are sufficiently different from those of felt/single ply coverings, to consider that (for the purposes of this Decision) neither felt nor single ply coverings provide a competitive constraint on mastic asphalt. Clear differences exist in relation to the weight, service life and durability of mastic asphalt and felt/single ply.
193. It should be noted (as set out in paragraph 30 above) that mastic asphalt is not only used in connection with flat roof coverings but also frequently as a covering for roof-top and other flat surfaces used for vehicular and/or pedestrian traffic. Briggs asserts in its representations that there should be a "second specialist sub-market for water proofing on car parks and other surfaces used for vehicular/pedestrian traffic (the competing products include mastic asphalt, liquid applied systems and deck proofing systems)".²⁴⁵ While there may be significant differences in the underlying building structure (since the roof or other flat surface needs to support the weight of vehicles and/or pedestrians) the OFT understands that the similarities outweigh the differences in relation to the nature of the mastic asphalt materials used and the relevant installation process, to further subdivide the mastic asphalt market by usage (i.e. trafficked and non-trafficked surface coverings).²⁴⁶
194. In relation to other types of alternative flat roofing materials, in particular deck proofing, metal, hot melt and liquid applied roofing products, the OFT has insufficient facts available to it to determine whether these products form part of the same market as mastic asphalt or felt/single ply, or whether they form one or more separate product markets. The OFT has therefore reached no firm conclusion as to the extent of the mastic asphalt market, and it is not necessary for the OFT to do so in order to determine whether there has been an infringement of the Chapter I prohibition.²⁴⁷ For the purpose of calculating penalties, in order to avoid any detriment to the Parties due to the insufficiency of information available to the OFT, relevant turnover will be calculated on the basis of a narrow market definition, namely mastic asphalt roof coverings, which comprises traditional and polymer modified mastic asphalt. Turnover in respect of other flat roof covering types will not be included when calculating penalties.

²⁴⁴ Representations of Briggs in response to the Statement of Objections, dated 21 December 2004.

²⁴⁵ *Ibid.*

²⁴⁶ See footnote 233 above.

²⁴⁷ See paragraph 178.

195. In summary, for the purpose of this Decision the OFT therefore remains of the view that, on balance, the relevant product market for the purposes of this Decision is the supply of installation, repair, maintenance and improvement services for mastic asphalt coverings for flat roofs (and other flat surfaces).

iii. The relevant geographic market

196. When defining the relevant geographic market, the OFT uses a similar approach to defining the relevant product market. The investigation in this case relates to a series of agreements and/or concerted practices in relation to contracts in connection with the provision of mastic asphalt works in various parts of Scotland.

197. The OFT notes that there are many variables which influence a roofing contractor's decision as to how far to travel to work on any given project:

- a. The amount of work a contractor has in its immediate locality at any one time, more particularly the level of definite future work in its order book and the level of prospective work gauged by the level of incoming tender invitations.
- b. The nature, monetary value, duration or prestige of a prospective contract is likely to encourage travel over long distances.
- c. A roofing contractor may have longstanding business relationships as a sub-contractor to certain firms of main contractors. For example, a roofing contractor may be engaged to provide the supply of installation, repair, maintenance and improvement services for mastic asphalt coverings for an employer who has several buildings spread over a wide geographical area.
- d. Work in large geographic or rural areas (such as Scotland) with relatively few concentrated centres of population may necessitate lengthier travel.²⁴⁸

198. Moreover, travel over longer distances may also be required if a specific product has been specified for a project in a locality that contains few approved contractors for that product. As noted in paragraph 31 above, the supply and installation of polymer modified asphalt is regulated by the MAC. At the time of the infringements there were only four MAC approved contractors in Scotland, i.e. the Parties.²⁴⁹ As a result these four approved contractors were invited to tender for projects across Scotland.

199. It should be noted in connection with all mastic asphalt contracts that one reason for the cover bidding advanced by the Parties was that while they might not have been interested in the particular contract they provided cover for, they were generally concerned to remain on the tender lists for

²⁴⁸ See footnote 233 above.

²⁴⁹ See paragraph 32 above.

future works across Scotland.²⁵⁰ This suggests that the Parties were at least in principle prepared to contemplate providing the supply of installation, repair, maintenance and improvement services for mastic asphalt coverings in Scotland.

200. The evidence of the contracts subject to this Decision also supports the conclusion that contractors are prepared to travel considerable distances to undertake mastic asphalt work.²⁵¹

201. The OFT therefore considers that for the purposes of this Decision the relevant geographic market is Scotland.

iv. The relevant market - conclusion

202. The OFT finds that the relevant market for the purposes of this Decision is the supply of installation, repair, maintenance and improvement services for mastic asphalt coverings for flat roofs (and other flat surfaces) in Scotland.

F. Undertakings

203. The word 'undertaking' is not defined in the Act or the EC Treaty. It is a wide term that the European Court of Justice ('the ECJ') has held to cover "any entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed".²⁵² The OFT considers that the Parties referred to at paragraph 1 above all constitute undertakings for the purposes of the Act.

204. In its representations,²⁵³ Lenaghen argues that during the period of the infringements, Lenaghen was a partnership. On 14 March 2004, the partnership was incorporated into a limited company. Accordingly, Lenaghen asserts that the company is not the economic successor of the partnership for the purposes of continued liability for penalties for breaches of competition rules by the partnership.

205. The OFT is of the view that despite the change in legal form, Lenaghen is the economic successor of the dissolved partnership. Both the partnership and the limited company have the same name, undertake the same activity and are located at the same address. In addition, it employs/engages almost the same persons, and exploits the same assets. In particular, the OFT notes that the Lenaghen leniency agreement was signed by Mr Stuart Lenaghen (during the period when Lenaghen was still a partnership), who is

²⁵⁰ See, for example, the mitigation statement dated 19 February 2003 prepared by Mr John Thomson, a senior manager of Walker, as part of Walker's leniency application; the interview record of Mr L, a senior manager of Briggs Scotland, dated 15 January 2002; and the statement of Mr Stuart Lenaghen, a senior manager of Lenaghen, dated 13 May 2003.

²⁵¹ For example, Pirie which is based in Paisley carried out mastic asphalt roofing works at the Kagyu Samye Ling Tibetan Centre near Langholm around 90 miles away from its base.

²⁵² Case C-41/90 *Hofner and Elser v Macroton* [1991] ECR I-1979, at paragraph 21.

²⁵³ Paragraph 2.0 of Lenaghen's written representations dated 5 January 2005, in response to the Statement of Objections.

now a director of the company Lenaghen. Accordingly, the OFT is of the view that Lenaghen is responsible for any possible financial penalty imposed as a result of competition law breaches committed by the dissolved partnership.²⁵⁴

G. Relevant case law in relation to agreements or concerted practices between undertakings

206. An 'agreement' does not have to be a formal written agreement to be covered by the Chapter I prohibition. The prohibition is intended to catch a wide range of agreements and concerted practices, including oral agreements and 'gentlemen's agreements' as, by their nature, anti-competitive agreements are rarely in written form.²⁵⁵ This is irrespective of the manner in which the parties' intention to behave on the market in accordance with the terms of that agreement is expressed.²⁵⁶
207. A finding of an agreement and/or concerted practice does not require a finding that all the parties have given their express or implied consent to each and every aspect of the agreement,²⁵⁷ the parties may show varying degrees of commitment to the common plan and there may well be internal conflict. The mere fact that a party does not abide fully by an agreement which is manifestly anti-competitive does not relieve that party of responsibility for it.²⁵⁸
208. The OFT considers that the Parties formed certain individual agreements and/or concerted practices as referred to in this Decision to fix prices, thereby infringing the Chapter I prohibition.

i. Agreements

209. An agreement within the meaning of the Chapter I prohibition exists in circumstances where there is a concurrence of wills in that a group of undertakings adhere to a common plan that limits or is likely to limit their

²⁵⁴ See *Walt Wilhelm v Bundeskartellamt*, Case 14/68 [1969] ECR 1, [1969] CMLR 100; *Suiker Unie* OJ 1973 L140/7; *Enichem Anic v Commission* [1991] ECR II-1623 and *Commission v Anic Partecipazioni* Case C-49/92 [1999] ECR 4125; *Cartonboard* OJ 1994 I234/1; and *Rheinzink* Cases 29, 30/83 [1984] ECR 1679, among others.

²⁵⁵ See the OFT Guideline 401 'Agreements and Concerted Practices', December 2004 at paragraph 2.7. See also the judgment of the ECJ regarding gentlemen's agreements in Case C-42/69 *ACF Chemiefarma NV v European Commission* [1970] ECR 661 (in particular, paragraphs 106-114). Also the European Commission in, for example, its decision in *Citric Acid Cartel* [2002] OJ L239/18, 6 September 2002, paragraph 137.

²⁵⁶ Joined cases T-305/94 etc. *Limburgse Vinyl Maatschappij NV and others v Commission* ('PVC II') [1999] ECR II-931 at paragraph 715.

²⁵⁷ Case C-49/92P *European Commission v Anic Partecipazioni* [1999] ECR I-4125, paragraph 80; Case T-28/99 *Sigma Technologie di Rivestimento v European Commission* [2002] ECR II-1845, paragraph 40.

²⁵⁸ Case T-305/94 etc. *Limburgse Vinyl Maatschappij v European Commission* [1999] ECR II-931, paragraph 773; Case T-141/89 *Trefileurope v European Commission* [1995] ECR II-791, paragraphs 60 and 85.

individual commercial freedom by determining lines of mutual action or abstention from action.²⁵⁹

210. There is no requirement for the agreements to be legally binding or formal, nor contain any enforcement mechanisms.²⁶⁰ An agreement may be express or implied from the conduct of the parties.²⁶¹ As held by the European Court of First Instance ('the CFI'), for an agreement to exist:

'it is sufficient if the undertakings in question have expressed their joint intention to conduct themselves on the market in a specific way.'²⁶²

An agreement may consist not only of an isolated act, but also of a series of acts or a course of conduct.²⁶³

ii. Concerted practices

211. The Chapter I prohibition also applies in respect of concerted practices. A concerted practice does not require an actual agreement (whether express or implied) to have been reached. A concerted practice has been defined by the ECJ as:

'...a form of co-ordination between undertakings which, without having reached the stage where an agreement properly so called has been concluded, knowingly substitutes practical co-operation between them for the risks of competition.'²⁶⁴

212. Economic operators are required to maintain independence. This requirement of independence strictly precludes:

'any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.'²⁶⁵

213. Whilst the concept of a concerted practice implies the existence of reciprocal contracts, the CFI has held that:

²⁵⁹ Case T-41/96 *Bayer v European Commission* [2000] ECR II-3383, paragraph 69. See also the judgment of the CAT in *JJB Sports plc v OFT* and *AllSports Ltd v OFT* [2004] CAT 17 ('*Replica Kit*'), at paragraphs 156 and 637.

²⁶⁰ *Soda-ash/Solvay, CFK* OJ [1991] L 152/16, [1994] 4 CMLR 645, paragraph 11; *PVC* [1994] OJ L 239/14, paragraph 30.

²⁶¹ Case 41/69 *ACF Chemiefarma v European Commission* [1970] ECR 661 at, for example, paragraphs 110-114; Case T-7/89 *Hercules Chemicals v European Commission* [1991] ECR II-1711, paragraphs 256-258.

²⁶² Case T-7/89 *Hercules v European Commission* [1991] ECR II-1711, paragraph 256; Case T-41/96 *Bayer v European Commission* [2000] ECR II-3383, paragraph 69. See also the *Replica Kit* judgment [2004] CAT 17 at paragraph 156.

²⁶³ Case C-49/92P *European Commission v Anic Partecipazioni* [1999] ECR I-4125, paragraph 81.

²⁶⁴ Case 48/69 *ICI Ltd. v European Commission* [1972] ECR 1969, paragraph 64. See also the *Replica Kit* judgment [2004] CAT 17 at paragraph 151.

²⁶⁵ Cases 40/73 etc *Suiker Unie and others v European Commission* [1975] ECR 1663, paragraph 174.

'that condition is met where one competitor discloses its future intentions or conduct on the market to another when the latter requests it, or at the very least, accepts it.'²⁶⁶

214. The concept of a concerted practice must be understood in light of the principle that each economic operator must determine independently the policy it intends to adopt on the market²⁶⁷. The ECJ has stated that there is a presumption (which it is for the parties to rebut) that an undertaking which remains active on the market has taken into account information exchanged with its competitors in determining its conduct on that market²⁶⁸.

215. The Commission clearly stated in the case of *British Sugar*,²⁶⁹ that there can be a concerted practice in the absence of an actual effect on the market. Indeed, in *Hüls*,²⁷⁰ the ECJ held that a concerted practice which has as its object the prevention, restriction or distortion of competition will infringe competition law even where there is no effect on the market.²⁷¹

216. All the principles set out in paragraphs 211 to 215 above were cited with approval by the CAT in *WM Roofing I*.²⁷² In addition, the OFT has had regard to the CAT's summary of the law relating to the notion of agreements and concerted practices as set out in *Replica Kits*²⁷³ and *Toys*.²⁷⁴

iii. Agreement 'and/or' concerted practice

217. The ECJ has also confirmed that it is not necessary, for the purposes of finding an infringement, to characterise conduct as exclusively an agreement or a concerted practice.²⁷⁵ The concepts of agreement and

²⁶⁶ Cases T-25/95 etc *Cimenteries CBR v European Commission* [2000] ECR II-491, paragraph 1849.

²⁶⁷ Case C-199/92 *P etc. Hüls AG v. Commission* [1999] ECR I-4287.

²⁶⁸ Case C-199/92 *P etc. Hüls AG v. Commission* [1999] ECR I-4287 at paragraph 161 *et seq*, and Case T-25/95 etc *Cimenteries CBR v. Commission* [2000] ECR-II 491, paragraph 1910.

²⁶⁹ *British Sugar plc, Tate & Lyle plc, Napier Brown & Co Ltd James Budgett Sugars Ltd* OJ [1999] L 76/1, [1999] 4 CMLR 1316, paras 95ff, substantially upheld on appeal Cases T-202/98 etc, *Tate & Lyle v Commission* [1975] ECR II-2035, [2001] 5 CMLR 859.

²⁷⁰ Case C-199/92 *P ETC Hüls AG v Commission* [1999] ECR I-4287, [1999] 5 CMLR 1016, paragraph 193; see similarly the CFI in Cases T-141/94 etc *Thyssen Stahl v Commission* [1999] ECR II-347, [1999] 4 CMLR 810, paragraphs 269-272, dealing in this case with former Article 65(1) ECSC.

²⁷¹ For example, where a concerted practice to fix prices in relation to the tenders submitted for a contract has been implemented but where the contract is never actually awarded.

²⁷² *WM Roofing I* judgment, at paragraph 206.

²⁷³ *JJB Sports and AllSports Ltd v OFT* [2004] CAT 17 ('*Replica Kits*'), paragraphs 150-163.

²⁷⁴ *Argos Limited and Littlewoods Limited v OFT* [2004] CAT 24 ("*Toys*"), paragraphs 145-156.

²⁷⁵ Case T-7/89 *Hercules Chemicals v European Commission* [1991] ECR II-1711, paragraph 264; Case T-1/89 *Rhone Poulenc v European Commission* [1991] ECR II-867, paragraph 127; Case T-305/94 *Limburgse Vinyl Maatschappij v European Commission* [1999] ECR II 931, paragraph 697.

concerted practice are not mutually exclusive and there is no rigid dividing line between the two, they are intended;

'to catch forms of collusion having the same nature and only distinguishable from each other by their intensity and the forms in which they manifest themselves.'²⁷⁶

218. This is particularly the case in complex infringements involving a series of measures by several undertakings over a period of time which manifests itself both in agreements and concerted practices with a common objective. It is therefore not necessary for the OFT to come to a conclusion as to whether the behaviour of the Parties specifically constitutes an agreement or a concerted practice in order to demonstrate an infringement of the Chapter I prohibition in the present case.

219. The CAT has confirmed most recently in its judgements in both *Replica Kits*²⁷⁷ and *Toys*²⁷⁸ that;

"665. It is trite law that it is not necessary for the OFT to characterise an infringement as either an agreement or a concerted practice: it is sufficient that the conduct in question amounts to one or the other".

220. It is therefore not necessary for the OFT to come to a conclusion as to whether the behaviour of the Parties specifically constitutes an agreement or a concerted practice in order to demonstrate an infringement of the Chapter I prohibition in the present case.

iv. Burden and standard of proof

221. The burden of proving an infringement of the Chapter I prohibition lies upon the OFT. The CAT held in *Napp*²⁷⁹ that,

"95...As regards the burden of proof, the Director²⁸⁰ accepts that it is incumbent upon him to establish the infringement, and that the persuasive burden of proof remains on him throughout. However, that does not necessarily prevent the operation of certain evidential presumptions...

100. In our view it follows from Article 6(2) [of the European Convention on Human Rights] that the burden of proof rests throughout on the Director to prove the infringements alleged."

²⁷⁶ Case C-49/92P *European Commission v Anic Partecipazioni SpA* [1999] ECR I-4125, paragraph 131.

²⁷⁷ Case JJB Sports PLC v Office of Fair Trading [2004] CAT 17, paragraph 644.

²⁷⁸ *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2004] CAT 24, paragraph 665.

²⁷⁹ *Napp Pharmaceutical Holdings Ltd v DGFT*, [2002] CAT 1 paragraphs 95 and 100. The CAT confirmed this approach in the recent *Replica Kit* judgment *JJB Sports PLC v Office of Fair Trading* [2004] CAT 17, at paragraph 164. See also paragraphs 928 and 931.

²⁸⁰ References to the 'Director' are to the Director General of Fair Trading. As from 1 April 2003, the Enterprise Act 2002 transferred the functions of the Director General of Fair Trading to the OFT.

222. In considering the standard of proof required to establish the infringements outlined in this Decision, the OFT has taken note of the recent ruling by the CAT in the *Replica Kit* appeals.²⁸¹ The CAT notes,

“204. It also follows that the reference by the Tribunal to “strong and compelling” evidence at [109] of *Napp* should not be interpreted as meaning that something akin to the criminal standard is applicable to these proceedings. The standard remains the civil standard. The evidence must however be sufficient to convince the Tribunal in the circumstances of the particular case, and to overcome the presumption of innocence to which the undertaking concerned is entitled.”

223. The CAT also notes in the same judgment,

“206. As regards price fixing cases under the Chapter I prohibition, the Tribunal pointed out in *Claymore Dairies*²⁸² that cartels are by their nature hidden and secret; little or nothing may be committed to writing. **In our view even a single item of evidence, or wholly circumstantial evidence,** depending on the particular context and the particular circumstances, may be sufficient to meet the required standard: see *Claymore Dairies* at [3] to [10]...²⁸³ As the Court of Justice said in Cases 204/00P etc. *Aalborg Portland v European Commission*, judgment of 17 January 2004, not yet reported, at paragraphs 55 to 57:

“55. Since the prohibition on participating in anti-competitive agreements and the penalties which offenders may incur are well known, it is normal for the activities which those practices and those agreements entail to take place in a clandestine fashion, for meetings to be held in secret, most frequently in a non-member country, and for the associated documentation to be reduced to a minimum.

56. Even if the Commission discovers evidence explicitly showing unlawful conduct between traders, such as the minutes of a meeting, it will normally be only fragmentary and sparse, so that **it is often necessary to reconstitute certain details by deduction...**

57. In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules.”

207. We note also that since the coming into force of the Regulation 1/2003 on 1 May 2004 the Act as amended envisages the possibility of the OFT imposing penalties for breaches of Articles 81 or 82 of the EC Treaty, as part of the European system established by that Regulation. That reinforces our view that the standard of proof we apply should not be out of line with that applied by the Court of First Instance and Court of Justice when considering an appeal against a decision of the European

²⁸¹ *Replica Kit* judgment, at paragraph 204. See also *Toys* judgment, paragraphs 164-165.

²⁸² *Claymore Dairies v. OFT* [2003] CAT 18.

²⁸³ See also, for example, the opinion of Judge Vesterdorf, acting as Advocate General, in *Rhône-Poulenc v European Commission* [1991] ECR-II at p. 867; and *Cimenteries* (see note 266 above).

Commission: see *Napp* at [112]. In our view *Aalborg Portland*, cited above, confirms the approach we have adopted.”

(Emphasis added).

224. In using the term 'strong and compelling' to describe its evidence in paragraph 338 below, the OFT has followed the same principle. The OFT considers that the evidence set out below is sufficient to overcome the presumption of innocence to which the Parties are entitled.

H. Analysis of evidence relied on by the OFT

225. This section sets out the OFT's conclusions on the evidence relating to each contract (see paragraphs 57 to 171 above), having considered the views of the undertakings involved in each contract.

i. Ailsa Craig Lighthouse

Analysis of evidence

226. The OFT considers that the fax sent from Lenaghen to Walker on 11 August 2000 (referred to at paragraph 64 above) indicates that Lenaghen was giving Walker prior notice that it may be invited to tender and that, if this were the case, there would be further discussion about the contract. The OFT also notes that this fax was sent four days before the NLB sent out invitations to tender.

227. Moreover, the OFT considers that the subsequent fax from Lenaghen to Walker on 16 August 2000, which set out Lenaghen's bid, established that Lenaghen was the contractor seeking cover and requested that Walker submit a cover price. The OFT's conclusion is supported by the fact that Walker's bid, £49,385.00, was indeed higher than Lenaghen's bid of £45,988.00.

228. It is further noted that Lenaghen's bid was identical to the bid that it had previously advised Walker it would submit, establishing that on this occasion there was an understanding that the contractor seeking cover, Lenaghen, was requesting Walker to submit a cover price. Mr Thomson of Walker confirmed in his statement that Lenaghen had been the contractor seeking cover and that Lenaghen had approached Walker to provide a cover price, which Walker subsequently did. Lenaghen also confirmed that it had sent a copy of its bid to Walker.

The participants' representations

Lenaghen's representations

229. Lenaghen “accepts responsibility for uncompetitive practices only in relation to the *Ailsa Craig Lighthouse* contract”.²⁸⁴ However, Lenaghen states that it was “successful in winning the contract upon the basis of

²⁸⁴ Paragraph 5.1 of Lenaghen's written representations dated 5 January 2005, in response to the Statement of Objections.

[its] best price and in that contract it was open to the other contractors to submit bids for whatever price they chose”.

230. It would appear therefore that Lenaghen argues that winning the contract is a less serious infringement of competition rules, as opposed to actually providing a cover price, as it cannot be held responsible for the actions of others who may or may not decide to provide a cover price. Lenaghen also submits that Walker was not compelled to bid uncompetitively.

231. The OFT does not agree with Lenaghen's representation, as the test for whether competition rules have been breached is not whether Lenaghen compelled another undertaking to submit a cover price, but whether there was an agreement and/or concerted practice which had as its object or effect the prevention, restriction or distortion of competition. In addition, the OFT refers to the CAT's decision in *Toys II*.²⁸⁵ The OFT notes that in the absence of a formal sub-contracting relationship, there is no reason why undertakings invited to participate in a single stage (or any other) competitively tendered process would need to communicate with one another in relation to the tender before returning their bids to the local authorities, the surveyors or the private agents managing the tendering process.²⁸⁶ The faxes from Lenaghen to Walker, at paragraphs 64 to 66 above, containing Lenaghen's price for the contract, establish that Lenaghen was seeking a cover bid from Walker. This evidence is corroborated by the statement of Mr John Thomson of Walker at paragraph 67 and by Lenaghen's own representation that it *“accepts responsibility for uncompetitive practices...in relation to the Ailsa Craig Lighthouse contract”*.

232. No representations regarding this contract were made by the other Party.

The OFT's conclusions

233. The OFT concludes that the totality of the evidence,²⁸⁷ as analysed at paragraphs 226 to 232 above, establishes that an agreement and/or concerted practice was in place between Lenaghen and Walker, in breach of the Chapter I prohibition, which had the object of fixing tender prices in relation to the tenders submitted by each undertaking for the Ailsa Craig Lighthouse contract.

ii. Access Walkways

Analysis of evidence

234. The OFT considers that the undated document to “Steve”, (Briggs has confirmed that this refers to Steve Lamb, Commercial Manager of Briggs Scotland)²⁸⁸ set out at paragraph 75 above, indicates the existence of an

²⁸⁵ *Argos Ltd & Littlewoods v Office of Fair Trading* [2004] CAT 24, paragraph 708.

²⁸⁶ See footnote 33 'the 2003 Statement' of Ivan Jerram, and paragraph 42 above.

²⁸⁷ *Replica Kits*, paragraph 206 and *Toys*, paragraphs 164-165.

²⁸⁸ See e-mail from Briggs dated 15 July 2004.

arrangement between Briggs Scotland and Pirie to collude in respect of the bids submitted for this contract. This conclusion is supported by the evidence produced by Pirie, where Mr D noted that as far as he could recall, Briggs Scotland had been the contractor seeking cover and a cover price had been provided by Pirie and Lenaghan. In addition, Ruberoid advised that the initials, 'DMO' are David McPherson's (now deceased) initials²⁸⁹ a previous employee of Briggs Scotland. This evidence is corroborated by the Register produced by Briggs Scotland, which states "Pirie and Lenaghans informed".²⁹⁰ The OFT considers that the words "Good fat price required" indicates that Briggs Scotland intended to fix the tender price.

235. Briggs has been unable to confirm that "Jim" refers to Jim Stables of Pirie on the undated document set out at paragraph 75 above; although it has stated that the missing word in the first line of the undated document is probably "Pirie", another contractor.²⁹¹ The OFT however acknowledges that it could read, "...Jim 'price' walkways". The fact that Briggs produced this document in support of Ruberoid's leniency application and the fact that the missing word could be Pirie supports the OFT's view that Briggs Scotland appears to have been the contractor seeking cover on this occasion.
236. The OFT's view is reinforced by Mr A's explanation of how the Register operated, indicating that Briggs Scotland has been the contractor seeking cover, with cover prices submitted by Pirie and Lenaghan. Mr A also noted in the questionnaire he produced as a result of an internal audit conducted by Briggs' legal representatives in relation to this contract that Pirie and Lenaghan had provided a cover price to Briggs Scotland in September 2000.
237. Mr A's evidence is corroborated by Mr B, a senior manager of Briggs. Mr B identified this contract as being subject to collusion and noted that Briggs Scotland had been the contractor seeking cover and that cover prices had been provided by Pirie and Lenaghan.
238. In addition, although not conclusive evidence by itself, the statement of Mr Stuart Lenaghan, a senior manager of Lenaghan that, "I've a feeling it was mentioned by either Durastic or Briggs that they were going for the contract" supports the OFT's assumption that Briggs Scotland appears to have been the contractor seeking cover. It also indicates that Briggs Scotland had discussed this contract with Lenaghan and that therefore Lenaghan may well have provided a cover price, as noted by Briggs Scotland and Pirie.
239. The OFT also considers that the bids submitted by each Party, set out at paragraph 73 above, support the statements made by the leniency applicants and establish that Briggs Scotland was the contractor seeking

²⁸⁹ See e-mail from Robert Vidal of Hammond Suddards Edge, solicitors acting on behalf of Ruberoid, dated 15 June 2004.

²⁹⁰ See copy of the Register, set out at paragraphs 54 - 56 above.

²⁹¹ See record of Briggs Scotland's response to various OFT questions dated 15 June 2004.

cover. Briggs Scotland therefore submitted the lowest bid with cover prices being submitted by Pirie and Lenaghan.

The participants' representations

Lenaghan's representations

240. Lenaghan made a number of representations²⁹² regarding the quality of evidence stating that the evidence of Lenaghan, Briggs Scotland, and Pirie in this contract does not meet the standard of proof i.e. "strong and compelling" established by the CAT in *Napp*, and that some of the evidence appears to be hearsay evidence.
241. No representations regarding this contract were made by any of the other Parties.

The OFT's conclusions

242. The burden of proving an infringement of the Chapter I Prohibition lies with the OFT. In considering the standard of proof required, the OFT has had regard to the recent ruling by the CAT in *Replica Kits*, which states that the criminal standard is not applicable as the standard of proof remains the civil standard, discussed in further detail in paragraphs 221 to 224 above.

243. In *Replica Kits*, when looking at the quality of evidence, the CAT referred to *Claymore Dairies* stating that:²⁹³

"...cartels are by their nature hidden and secret; little or nothing may be committed to writing. **In our view even a single item of evidence, or wholly circumstantial evidence**, depending on the particular context and the particular circumstances, may be sufficient to meet the required standard" (emphasis added).

244. The OFT notes that Lenaghan does not dispute the facts, but the quality of the evidence for this infringement. Although the statement of Mr Stuart Lenaghan is not conclusive evidence in itself, it does corroborate the evidence of Briggs Scotland and Pirie. The documentary evidence in this contract is corroborated by the explanation given by Mr A of Briggs Scotland of how the Register operated, the questionnaire produced by Mr B of Briggs, and the list of contracts subject to collusion produced by Mr D of Pirie. In addition, when asked about this contract, Mr Stuart Lenaghan said "I've a feeling it was mentioned by either Durastic or Briggs that they were going for the contract".

245. The OFT concludes that the totality of the evidence,²⁹⁴ as analysed at paragraphs 234 to 241 above establishes that an agreement and/or concerted practice was in place between Briggs Scotland/Durastic,²⁹⁵ Pirie

²⁹² Paragraph 4.1 of Lenaghan's written representations dated 5 January 2005, in response to the Statement of Objections.

²⁹³ *Replica Kit* judgment, at paragraph 204, referring to the judgment *Claymore Dairies v. OFT* [2003] CAT 18.

²⁹⁴ See *Replica Kits*, paragraph 206, and *Toys*, paragraph 164-165.

²⁹⁵ Durastic is a trading style of Briggs. See paragraph 4 above.

and Lenaghen, in breach of the Chapter I prohibition, which had the object of fixing tender prices in relation to the tenders submitted by each undertaking for the Access Walkways contract.

iii. Asda Stores

Analysis of evidence

246. The OFT considers that the words, "Our rates" in the fax sent by Durastic to Walker on 23 May 2001 establish that Durastic²⁹⁶ sent its bid to Walker with the intention of advising Walker to submit a higher bid in accordance with the cover pricing arrangement explained by Mr A of Briggs Scotland.²⁹⁷ This conclusion is supported by the fact that the bid sent by Durastic to Bielski Associates on 21 May 2001 was £350,102.09 + VAT, and was identical to the figure Durastic sent to Walker, the only difference being that Durastic omitted the VAT element in the figure it sent to Walker. The bid subsequently submitted by Walker on 24 May 2001, of £395,600.00 + VAT was indeed significantly higher than Durastic's communicated bid.
247. The OFT's conclusion set out above is reinforced by the witness statements made by employees of Pirie and Walker. The evidence provided by Mr D (an estimator of Pirie) corroborates the fact that this contract had been subject to collusion. Briggs Scotland had been the contractor seeking cover and cover prices had been provided by Walker, Lenaghen and Pirie. Walker confirmed that Durastic had been the contractor seeking cover and that it had submitted a cover price at the request of Durastic.
248. With regard to Lenaghen's involvement, although Lenaghen has not admitted to providing a cover price, Mr Stuart Lenaghen (at paragraph 90 above) stated that if there was a cover bid then he assumes it must have been for Briggs Scotland, because it was too big for Walker or Lenaghen. This statement corroborates the evidence from Briggs Scotland, Pirie and Walker that Briggs Scotland had been the contractor seeking cover and that cover prices had been submitted by Pirie and Walker.
249. The fact that this contract may not have been implemented does not have any impact on the finding that an arrangement was in place between Briggs Scotland, Walker, Pirie and Lenaghen to fix the tender price. It is settled case law that where an agreement and/or concerted practice has as its object the prevention, restriction or distortion of competition there is no need to assess its effects.²⁹⁸ In addition, the European Commission has

²⁹⁶ Briggs/Durastic form part of the economic entity ultimately controlled by Ruberoid. As part of the leniency application made by Ruberoid, statements were taken from Briggs Scotland. See paragraph 4 above.

²⁹⁷ See record of interview of Mr A, a senior manager of Briggs Scotland, dated 11 September 2002. See also paragraphs 54 - 56 above.

²⁹⁸ *Societe Technique Miniere v Maschinenbau Ulm GmbH*: 56/65 [1966] ECR 235, [1966]

concluded that there can be a concerted practice in the absence of an actual effect on the market.²⁹⁹

The participants' representations

Lenaghan's representations

250. Lenaghan asserts that it was not party to this infringement as the bid it submitted to Asda Stores is dated 5 July 2002,³⁰⁰ which is over a year later than bids from the other Parties, and therefore unrelated to the contract in question.³⁰¹
251. The OFT has reviewed the evidence³⁰² and notes that the specification contained in Lenaghan's bid is identical to the specification requested by Asda in May 2001 (e.g. roof car park permapark of Asda on River Street, Ayr). However, having re-evaluated the evidence, due to the length of time between tenders (May 2001 and July 2002), combined with the fact that the 2002 date in Lenaghan's bid occurs on more than one occasion (and therefore is unlikely to be a typographical error), the OFT considers that Lenaghan's tender for Asda Stores relates to a different contract. Therefore, the OFT has decided to exclude Lenaghan from this infringement.
252. No representations regarding this contract were made by any of the other Parties.

The OFT's conclusions

253. The OFT concludes that the totality of the evidence,³⁰³ as analysed at paragraphs 246 to 252 above, establishes that an agreement and/or concerted practice was in place between Briggs Scotland/Durastic,³⁰⁴ Walker and Pirie, in breach of the Chapter I prohibition, which had the object of fixing tender prices in relation to the tenders submitted by each undertaking for the contract to replace the roof car park surface at Asda's Ayr store. The OFT does not consider that there is sufficient evidence available to it to find that such agreement and/or concerted practice was in place with Lenaghan on this occasion.

²⁹⁹ See Section II. "Legal and Economic Assessment" above.

³⁰⁰ Documents BG17 and KB20. See paragraph 90 above.

³⁰¹ Paragraph 4.2 of Lenaghan's written representations dated 5 January 2005, in response to the Statement of Objections.

³⁰² Documents BG17 and KB20. See paragraph 90 above.

³⁰³ *Replica Kits*, paragraph 206 and *Toys*, paragraphs 164-165.

³⁰⁴ Durastic is a trading style of Briggs. See paragraph 4 above.

iv. Cardinal Newman High School

Analysis of evidence

254. The OFT considers that the words, "Please find a copy of our quotation ...as discussed" and "As usual, these are **OUR RATES.**" on the fax sent from Pirie to Walker on 24 April 2001 establish that Pirie had previously contacted Walker to discuss the bids that each would be submitting for this contract. In addition, from the evidence provided, on this occasion Pirie was to be the contractor seeking cover and Walker was to provide a cover price. Moreover, the record of the sub-contractor quotes³⁰⁵ for the Cardinal Newman High School contract referred to at paragraph 93 above confirms that Pirie did in fact submit a bid of £31,983.16 as indicated in the note on the fax dated 24 April. Further, Walker's bid of £34,787.75 was higher which would correspond with the way in which the cover bidding system operated as explained by Mr A at paragraph 97 above.
255. Mr John Thomson, a senior manager of Walker also confirmed that Walker did indeed submit a cover price based on the prices provided by Pirie.
256. Further evidence that the agreement and/or concerted practice was in place between Pirie and Briggs Scotland, is provided by the interview of Mr A (a senior manager of Briggs Scotland), and the memorandum prepared by Mr B (a senior manager of Briggs). According to Mr A's explanation of the Register, the tick placed in the column marked Pirie, indicates that Pirie had been the contractor seeking cover. The OFT also notes the statement of Mr A regarding the way in which the Register was operated whereby if one of the contractors involved in the cover pricing arrangement was the contractor seeking cover then the other two would provide cover prices. On this occasion as Pirie was the contractor seeking cover, cover prices would have been provided by Briggs Scotland and Lenaghen.
257. In addition, Mr B of Briggs noted in the memorandum he prepared for Mr E, manager of Ruberoid³⁰⁶, that Pirie had been the contractor seeking cover and that a cover price had been provided by Briggs Scotland. The fact that Mr B did not note that a cover price had been provided by Lenaghen can be explained by the fact that this information was being gathered from memory in some cases. Mr D, an estimator of Pirie, produced a list of contracts which had been subject to collusion and noted that Pirie had been the contractor seeking cover and that cover prices had been provided by Briggs Scotland and Lenaghen.
258. With regard to Lenaghen's involvement, the Register provided by Briggs Scotland, and the statement of Mr D of Pirie note that Lenaghen had provided a cover price in relation to this contract.

³⁰⁵ See document entitled 'Sub-contractor Quotes received as at 15.15pm Tuesday 19 June 2001, produced by George Allan, Managing Director of David H Allan to support his witness statement, dated 26 February 2003.

³⁰⁶ See paragraph 50 above. Mr B's memorandum notes that the date for this contract was August 2001, although all tenders were received by June 2001. This can be explained by the fact that this information was being gathered from memory in some cases.

The participants' representations

259. Lenaghan made a number of representations³⁰⁷ regarding the quality of evidence stating that the evidence of Briggs Scotland and Pirie in this contract does not meet the standard of proof, i.e. "strong and compelling" established by the CAT in *Napp*, and that some of the evidence appears to be hearsay evidence.
260. Lenaghan also contends that the OFT has not shown that Lenaghan provided a cover bid for this contract, arguing that "*it is clear that there was an expectation that cover would be provided however that is not to say that the bid submitted was in fact a cover bid. It is important to distinguish between a bid that may prove to be unsuccessful, but had been a serious bid, and a cover bid*". In addition, Lenaghan asserts that it had not been given the opportunity to comment on this contract prior to the Statement of Objections.
261. No representations regarding this contract were made by any of the other Parties.

The OFT's conclusions

262. The burden of proving an infringement of the Chapter I Prohibition lies with the OFT. In considering the standard of proof required, the OFT has had regard to the recent ruling by the CAT in *Replica Kits*, which states that the criminal standard is not applicable as the standard of proof remains the civil standard, discussed in further detail in paragraphs 221 to 224 above.
263. In *Replica Kits*, when looking at the quality of evidence, the CAT referred to *Claymore Dairies* stating that:³⁰⁸
- "...cartels are by their nature hidden and secret; little or nothing may be committed to writing. **In our view even a single item of evidence, or wholly circumstantial evidence**, depending on the particular context and the particular circumstances, may be sufficient to meet the required standard" (emphasis added).
264. Unlike the Access Walkways infringement above, in which the evidence was corroborated by the explanation given by Mr A of Briggs Scotland of how the Register operated, the questionnaire produced by Mr B of Briggs, the list of contracts subject to collusion produced by Mr D of Pirie, and a statement of Mr Stuart Lenaghan, the documentary evidence in this contract relies on the statement of Mr D of Pirie, which is corroborated by the explanation given by Mr A of Briggs Scotland regarding the Register.
265. The OFT has reviewed the evidence and notes that the only direct evidence implicating Lenaghan to this infringement is the evidence of Mr D of Pirie. Although this evidence is corroborated by Mr A and the fact that Lenaghan submitted a higher bid, the OFT considers that there is insufficient evidence to show that Lenaghan was party to an agreement and/or

³⁰⁷ Paragraph 4.3 of Lenaghan's written representations dated 5 January 2005, in response to the Statement of Objections.

³⁰⁸ *Replica Kit* judgment, at paragraph 204, referring to *Claymore Dairies v. OFT* [2003] CAT 18.

concerted practice to provide non-competitive prices in relation to the tenders submitted for the Cardinal Newman School contract.

266. On the question raised in Lenaghan's representations concerning the fact that Lenaghan was not given the opportunity to discuss this contract when the OFT was conducting interviews, the OFT is not obliged to put every allegation of anti-competitive behaviour to the Parties before the issuing of a Statement of Objections where the OFT is satisfied that the evidence available to it at that stage is sufficient for a finding of an infringement of the Chapter I prohibition, if uncontested. In any event the allegations and the evidence on which the allegations are based were put to the Parties in the Statement of Objections dated 2 November 2004 and the Parties were afforded the opportunity to make representations on the evidence and the OFT's analysis of that evidence.
267. The OFT concludes that the totality of the evidence,³⁰⁹ as analysed at paragraphs 254 to 261 above, establishes that an agreement and/or concerted practice was in place between Pirie, Briggs Scotland, and Walker, in breach of the Chapter I prohibition, which had the object of fixing tender prices in relation to the tenders submitted by each undertaking for the Cardinal Newman High School contract. The OFT does not consider that there is sufficient evidence available to it to find that such agreement and/or concerted practice was in place with Lenaghan on this occasion

v. Elderpark Clinic

Analysis of evidence

268. The OFT is of the view that the evidence above shows that an arrangement existed between Pirie and Walker whereby if Walker were invited to tender by Clark Contracts or Alexander Braidwood for the Elderpark Clinic contract, Walker would have provided a cover price to Pirie. Although Pirie has confirmed that it was the contractor seeking cover, Pirie believed a cover price had only been provided by Briggs Scotland. With regard to Walker's involvement, the OFT is of the view that as Pirie's list summarising those contracts that had been subject to collusion was produced from memory, it is reasonable to assume that Pirie has simply forgotten that a cover price was requested from Walker. With regard to Briggs Scotland's involvement, the OFT is of the view that save for the statement from Pirie that a cover price was provided by Briggs Scotland, no other documentary evidence has been found to implicate Briggs Scotland on this occasion.
269. The OFT considers that the words, "As discussed, these are OUR RATES" and "Thanks for your assistance" on the fax set out at paragraph 108 above, establish that Pirie sent Walker a copy of the bid that it would be submitting, and therefore, this contract had been discussed previously. Furthermore, Pirie sent this fax to Walker on 8 January 2002, one day before the expiration of the tender deadline.

³⁰⁹ *Replica Kits*, paragraph 206 and *Toys*, paragraphs 164-165.

270. The OFT considers that the statement by Mr Thomson that, “Walker obliged and submitted a tender with rates above those quoted by Pirie”, set out at paragraph 110 above, refers to the tender invitation sent to Walker by Alexander Braidwood. Although Alexander Braidwood was not awarded the main contractor contract, at the time Walker submitted its bid to Alexander Braidwood, Walker was not aware of this fact.
271. The OFT is of the view that the evidence above indicates that the words, “m/a Pirie” on the original letter from Alexander Braidwood to Walker, dated 13 December 2001, regarding the Elderpark Clinic contract, mean “mastic asphalt Pirie”. This suggests that Walker understood Pirie would be the contractor seeking cover and that a cover price would be required from Walker. The letter from Alexander Braidwood to Walker was an invitation to tender for the mastic asphalt roofing works at the Elderpark Clinic and provides an explanation as to the rationale behind Pirie's request that Walker submit a cover price, and supports the statement made by Mr Thomson, that Walker was asked to submit a cover price by Pirie and did so, as outlined in paragraph 110 above.
272. In any event, the uncertainty surrounding whether the contract was awarded does not affect the OFT's conclusion that the evidence demonstrates the existence of an agreement and/or concerted practice in breach of the Chapter I prohibition. Case law confirms that there is no need to wait to observe the concrete effects of an agreement once it appears that it has as its object or effect the prevention, restriction or distortion of competition.³¹⁰ The European Commission also clearly stated in *British Sugar*³¹¹ that there can be a concerted practice in the absence of an actual effect on the market.

The participants' representations

273. No representations regarding this contract were made by any of the Parties.

The OFT's conclusions

274. In the absence of any contradictory statement from the participants the OFT concludes that the totality of the evidence,³¹² as analysed at paragraphs 268 to 273 above, establishes that an agreement and/or concerted practice was in place between Pirie and Walker, in breach of the Chapter I prohibition, which had the object of fixing tender prices in relation to the tenders submitted by each undertaking for the Elderpark Clinic contract.

³¹⁰ *Société Technique Minière v Maschinenbau Ulm GmbH*: 56/65 [1966] ECR 235, [1966]

³¹¹ *British Sugar plc, Tate & Lyle plc, Napier Brown & Co Ltd James Budgett Sugars Ltd* OJ L 76/1, [1999] 4 CMLR 1316, paragraphs 95, substantially upheld on appeal Cases T-202/98 etc., *Tate & Lyle v Commission* [1975] ECR II-2035, [2001] 5 CMLR 859.. See also the CAT's decision in paragraph 706 of *Toys II*.

³¹² *Replica Kits*, paragraph 206 and *Toys*, paragraphs 164-165.

vi. Tibetan Centre – Phase I Roof Contract

Analysis of evidence

275. The OFT considers that the words, “Attached please find a copy of our quotation” and “as discussed these are our rates” in the fax of 21 April 2000 set out in paragraph 117 above establish that Pirie sent Walker a copy of their tender bid in relation to the Kagyu Samye Ling Tibetan Centre Phase I Roof contract and that Walker had agreed that it would submit a cover price which would be higher than Pirie's, as per the arrangement described by Briggs Scotland.³¹³ The second fax sent by Jim Stables of Pirie to John Thomson of Walker dated 10 May 2000 set out at paragraph 119 above, concerning alterations to the main item description was sent after Pirie and Walker had submitted their bids to Love Jenkins Associates. The OFT is of the view that Love Jenkins Associates may have sought an amended bid from all contractors invited to tender which would explain why Pirie sent Walker a copy of its amended quotation. The OFT is of the view that this amendment is further evidence that Walker had agreed that it would submit a cover price in relation to the tender it submitted for the re-roofing works at the Kagyu Samye Ling Tibetan Centre.
276. This conclusion is supported by the tender return documentation produced by Love Jenkins Associates which shows that Pirie submitted a bid of £52,286.68 and Walker submitted a higher bid of £55,820.85. The OFT notes that the bid submitted by Pirie (in paragraph 115 above) is identical to the figure Pirie sent Walker in the fax referred to in paragraph 117 above. Furthermore, the bid submitted by Walker was higher than the bid submitted by Pirie, demonstrating that Walker adhered to Pirie's request to submit a cover price in relation to the bids submitted for this contract.
277. Mr John Thomson, a senior manager of Walker, also stated in connection with the Kagyu Samye Ling Tibetan Centre Phase I Roof contract that Pirie specified in its fax to Walker dated 21 April 2000 that this sum was Pirie's rate and asked Walker to quote a higher rate. Pirie quoted £52,286.68 and Walker said that it subsequently “inflated” various figures and submitted a bid of £55,820.85. It is also noted that the breakdown of the total figure Walker submitted matches that written on a copy of the figures sent by Pirie to Walker in the fax set out above. The OFT is therefore of the view that Walker simply inflated the figures submitted by Pirie in order to obtain a higher tender figure than Pirie's.³¹⁴
278. Moreover, Pirie confirmed that it had been the contractor seeking cover for this contract and that it had requested a cover price from Briggs Scotland, Lenaghen and Walker. With regard to Briggs Scotland's involvement, there is no documentary evidence and no further statements from the other

³¹³ See record of interview of Mr A, a senior manager of Briggs Scotland dated 11 September 2002.

³¹⁴ Document found by OFT officials during a section 28 visit to Walker's premises on 20 November 2002. Ref CET/24

leniency applicants to indicate that Briggs Scotland was involved in this arrangement on this occasion.

279. With regard to Lenaghan's involvement, Mr Stuart Lenaghan of Lenaghan stated that, he believed Pirie had done the "leg-work for this" and asked Lenaghan to provide a cover price. However, Mr Stuart Lenaghan could not recall whether Lenaghan had actually provided a cover price at the request of Pirie. The only evidence implicating Lenaghan on this occasion is the evidence from Pirie. The OFT considers therefore that there is insufficient evidence to show that Lenaghan was party to an agreement and/or concerted practice to provide non-competitive prices in relation to the tenders submitted for the Kagyu Samye Ling Tibetan Centre Phase I Roof contract.

The participants' representations

Lenaghan's representations

280. Lenaghan agrees with the OFT's analysis of evidence that it was not involved in this contract.³¹⁵ No representations regarding this contract were made by any of the other Parties.

The OFT's conclusions

281. In the absence of any contradictory statements from the participants, the OFT concludes that the totality of the evidence,³¹⁶ as analysed at paragraphs 275 to 280 above, establishes that an agreement and/or concerted practice was in place between Pirie and Walker, in breach of the Chapter I prohibition, which had the object of fixing tender prices in relation to the tenders submitted by each undertaking for the Kagyu Samye Ling Tibetan Centre Phase I Roof contract.

vii. Tibetan Centre - Phase II Internal Fit-Out contract

Analysis of Evidence

282. With regard to the subsequent tendering exercise conducted in January 2002 for the Kagyu Samye Ling Tibetan Centre Phase II Internal Fit Out contract, Walker confirmed that Pirie had been the contractor seeking cover and that Pirie had asked Walker to submit a cover price by fax dated 14 January 2002. Walker stated that, "Again Pirie have specified their own rates. Pirie's quote was £9,525.40. Walker inflated the rate and submitted a higher price by letter dated 15 January 2002."
283. Pirie also noted that Pirie had been the contractor seeking cover and that cover prices had been submitted by Briggs Scotland, Walker and Lenaghan.

³¹⁵ Paragraph 4.4 of Lenaghan's written representations dated 5 January 2005, in response to the Statement of Objections.

³¹⁶ *Replica Kits*, paragraph 206 and *Toys*, paragraphs 164-165.

Again no further evidence has been obtained to establish that Briggs Scotland or Lenaghen provided cover prices on this occasion.

The participants' representations

Lenaghen's representations

284. Lenaghen agrees with the OFT's analysis of evidence that it was not involved in this contract.³¹⁷ No representations regarding this contract were made by any of the other Parties.

The OFT's conclusions

285. In the absence of any contradictory statements from the participants, the OFT concludes that the totality of the evidence,³¹⁸ as analysed at paragraphs 282 to 284 above, establishes that an agreement and/or concerted practice was in place between Pirie and Walker, in breach of the Chapter I prohibition, which had the object of fixing tender prices in relation to the tenders submitted by each undertaking for the Kagyu Samye Ling Tibetan Centre Phase II Internal Fit-Out contract.

viii. BT Extension

Analysis of evidence

286. The OFT considers that the words in the undated document produced by Briggs set out at paragraph 138 above, "Charlie will lay off" indicate that Briggs Scotland was noting that Charles Lenaghen of Lenaghen did not want this contract. This is supported by the evidence of Briggs and Pirie where it has been noted that Briggs Scotland was the contractor seeking cover and cover prices were provided by Pirie and Lenaghen.
287. Although Lenaghen was not invited to tender for the roofing works by HBG Construction, it was invited to tender by Melville Dundas and Sir Robert McAlpine Ltd.,³¹⁹ the other contractors bidding for the main contractor contract. Lenaghen sent a bid to Sir Robert McAlpine in the sum of £78,930.10 less 2.5% plus VAT. On this basis it is reasonable to assume that the note on the undated document produced by Briggs stating, 'Charlie will lay off' indicates that Briggs Scotland had contacted Charles Lenaghen, of Lenaghen on the basis that Lenaghen might be invited to tender by the main contractor who eventually won the contract from Standard Life.
288. The OFT notes the discrepancies regarding the date this contract was put out to tender. The documentation found by OFT officials during section 28

³¹⁷ Paragraph 4.4 of Lenaghen's written representations dated 5 January 2005, in response to the Statement of Objections.

³¹⁸ *Replica Kits*, paragraph 206 and *Toys*, paragraphs 164-165.

³¹⁹ Letter from Lenaghen, to Sir Robert McAlpine Ltd., dated 29 September 2000. Lenaghen quoted a bid of £78,930.10 less 2.5% plus VAT. Ref BG/11

visits to the Parties' premises indicates that the main contractor contract was put out to tender between September 2000 and January 2001. However, the leniency applicants refer to various dates in 2000 whilst the documentation produced by HBG Construction has noted that the contract was awarded to Durastic on 30 July 2001. The OFT is of the view that one explanation for this is that it was a large contract which resulted in a number of enquiries being made before the work commenced. In addition, much of the tender documentation held by HBG Construction has been destroyed. According to John Bacchetti, Managing Surveyor for HBG Construction, this is normal practice once the tender process has been finalised.³²⁰

289. The record of the interview with Mr A of Briggs Scotland and the memorandum prepared by Mr B of Briggs both state that Briggs Scotland was the contractor seeking cover and that cover prices had been provided by Pirie and Lenaghen. In addition, Mr D of Pirie confirmed that Briggs Scotland had been the contractor seeking cover and that cover prices had been provided by Pirie, Walker and Lenaghen. However, with regard to Walker's involvement, there is no other documentary evidence or evidence from any other leniency applicant to indicate that Walker was a party to this agreement and/or concerted practice on this occasion.

The participants' representations

Lenaghen's representations

290. Lenaghen made a number of representations³²¹ regarding the quality of evidence, stating that the evidence of Briggs and Pirie in this contract does not meet the standard of proof i.e. "*strong and compelling*" established by the CAT in *Napp*, and that some of the evidence appears to be hearsay evidence. In addition, Lenaghen argues that "*[t]he market cannot have been distorted by [Lenaghen's] cover bid. [Lenaghen's] cover bid was not addressed to the same entity as the other contractors*" and argues that therefore there was no distortion of the market. Furthermore, Lenaghen contends that the date of the tender (29 September 2000) means that the bid was for different works.
291. No representations regarding this contract were made by any of the other Parties.

The OFT's conclusions

292. The burden of proving an infringement of the Chapter I Prohibition lies with the OFT. In considering the standard of proof required, the OFT has had regard to the recent ruling by the CAT in *Replica Kits*, which states that the criminal standard is not applicable as the standard of proof remains the civil standard, discussed in further detail in paragraphs 221 to 224 above.

³²⁰ See statement of John Bacchetti, Managing Surveyor for HBG Construction, dated 24 January 2003.

³²¹ Paragraph 4.5 of Lenaghen's written representations dated 5 January 2005, in response to the Statement of Objections.

293. In *Replica Kits*, when looking at the quality of evidence, the CAT referred to *Claymore Dairies* stating that:³²²
- “...cartels are by their nature hidden and secret; little or nothing may be committed to writing. **In our view even a single item of evidence, or wholly circumstantial evidence**, depending on the particular context and the particular circumstances, may be sufficient to meet the required standard” (emphasis added).
294. The OFT notes that Lenaghen does not dispute the facts, but only the quality of the evidence in this contract. Lenaghen's bid for the contract was the highest bid received of which the OFT has evidence, suggesting that Lenaghen was providing a cover price.
295. The OFT considers that the words “Charlie will lay off” in the document produced by Briggs indicate that Briggs Scotland was noting that Lenaghen did not want this contract and had communicated this to Briggs Scotland. This is supported by the evidence of Briggs and Pirie where it has been noted that Briggs Scotland was the contractor seeking cover and cover prices were provided by Pirie and Lenaghen.
296. The fact that Lenaghen submitted its tender to another competing contractor (who ultimately did not win the overall contract) does not affect the OFT's conclusion that Lenaghen was a party to an agreement and/or concerted practice, the object of which was the fixing of tender prices in the context of the overall tender procedure for the BT Extension contract, as the Commission clearly stated in the case of *British Sugar*³²³ that, there can be a concerted practice in the absence of an actual effect on the market. Lenaghen's collusion for this contract is corroborated by the evidence provided by Pirie and Briggs.
297. In relation to Lenaghen's representation that the date of the tender (29 September 2000) means that the bid was for different works, this is not supported by the evidence. The OFT notes that the tenders received by the other contractors were all dated around September 2000. In addition, the OFT also considers that this tender must have related to the same works, as the main contractors were asked to provide a quote for the same works. In addition, this is corroborated by the fact that Lenaghen's bid was very similar to Durastic's bid, which was for the same works but for the other main contractor.
298. The OFT concludes that the totality of the evidence,³²⁴ as analysed at paragraphs 286 to 291 above, establishes that an agreement and/or concerted practice was in place between Briggs Scotland/Durastic, Pirie and Lenaghen, in breach of the Chapter I prohibition, which had the object of fixing tender prices in relation to the tenders submitted by each undertaking for the BT Extension contract at the Thistle Shopping Centre in Stirling.

³²² *Replica Kit* judgment, at paragraph 204, referring to *Claymore Dairies v. OFT* [2003] CAT 18.

³²³ *British Sugar plc, Tate & Lyle plc, Napier Brown & Co Ltd James Budgett Sugars Ltd* OJ [1999] L 76/1, [1999] 4 CMLR 1316, paragraphs 95, substantially upheld on appeal Cases T-202/98 etc, *Tate & Lyle v Commission* [1975] ECR II-2035, [2001] 5 CMLR 859.

³²⁴ *Replica Kits*, paragraph 206 and *Toys*, paragraphs 164-165.

ix. BBC Studios

Analysis of evidence

299. The OFT is of the view that evidence set out above demonstrates that Pirie and Walker agreed to fix the prices in relation to the tenders submitted for this contract. In particular, the OFT notes the quote of £7550.00, found at Walker's premises during a section 28 visit on 20 November 2002. Walker's bid is £1,006.95 more than the rate Pirie said it first quoted on 10 July 2001 in its fax to Walker set out at paragraph 145 above. The OFT also notes that Walker confirmed that it agreed to give Pirie a cover price if required, and explained that the words, "these are our prices" on the fax from Pirie to Walker meant that Walker was to submit a higher figure. Walker therefore agreed to submit an inflated figure at the request of Pirie rather than determine its own price independently.
300. Pirie stated that as far as it could remember Briggs Scotland had been the contractor seeking cover and cover prices had been provided by Pirie and Walker. There is, however, no other documentary or other evidence to indicate that Briggs Scotland was involved in the tendering process for this contract and/or a party to the collusive agreement in relation to this contract on this occasion. Contrary to Pirie's statement the OFT believes that the fax set out at paragraph 145 above, indicates that Pirie was the contractor seeking cover on this occasion and not Briggs Scotland. This view is supported by the statements of all four leniency applicants in this investigation, who all note that the lead contractor would provide a copy of its rates to the other contractors that had agreed to provide a cover price.

The participants' representations

301. No representations regarding this contract were made by any of the Parties.

The OFT's conclusions

302. In the absence of any contradictory statements from the participants, the OFT concludes that the totality of the evidence,³²⁵ as analysed at paragraphs 299 to 301 above, establishes that an agreement and/or concerted practice was in place between Pirie and Walker, in breach of the Chapter I prohibition, which had the object of fixing tender prices in relation to the tenders submitted by each undertaking for the BBC Studios Glasgow contract.

³²⁵ *Replica Kits*, paragraph 206 and *Toys*, paragraphs 164-165.

x. Clydeaway Skypark

Analysis of evidence

303. The OFT considers that the words, "Attached please find copy of our quotation for the **Mastic Asphalt** work at the above location, as discussed" together with, "As usual, these are **OUR RATES**" (at paragraph 152 above) establish that Pirie and Walker intended to submit non-competitive tenders in relation to the work required for the Clydeaway Skypark contract. Specifically, Pirie was seeking Walker's agreement that Walker would submit a higher bid.
304. The OFT's conclusion is supported by the witness statements of Walker and Pirie. Walker confirmed that it was requested to submit a cover price by Pirie and that the rates attached to its fax were its own. Walker's bid was therefore to be higher. Walker stated that it agreed and submitted a rate of £27,759.70, which was indeed higher than Pirie's quote of £25,280.00. The OFT also notes that the manuscript figure, £27,759.70 + VAT, on the letter found at Walker's premises set out at paragraph 223 above is identical to the figure Mr Thomson said Walker submitted.
305. Furthermore, Pirie also stated that it was the contractor seeking cover for this contract but that a cover price was provided by Briggs Scotland. The OFT is of the view that the fact that Pirie did not state that Walker was asked to provide a cover bid simply means that Pirie could not recall asking Walker for a cover bid. The table produced by Pirie setting out the contracts it believed had been subject to collusion was compiled from memory by Mr D. No other evidence has been found to implicate Briggs Scotland. The OFT is therefore of the view that there is insufficient evidence to implicate Briggs Scotland on this occasion.

The participants' representations

306. No representations regarding this contract were made by any of the Parties.

The OFT's conclusions

307. In the absence of any contradictory statements from the participants, the OFT concludes that the totality of the evidence,³²⁶ as analysed at paragraphs 303 to 306 above, establishes that an agreement and/or concerted practice was in place between Pirie and Walker, in breach of the Chapter I prohibition, which had the object of fixing tender prices in relation to the tenders submitted by each undertaking for the Clydeaway Skypark contract.

xi. Glasgow College of Nautical Studies

Analysis of evidence

³²⁶ *Replica Kits*, paragraph 206 and *Toys*, paragraphs 164-165.

308. The OFT considers that the evidence provided by Mr A, Mr B and Mr F confirms that Briggs Scotland had been the contractor seeking cover on this occasion. Mr A, Mr B, and Mr F note that cover prices had been provided by Pirie, Lenaghen and Walker.
309. Pirie has also noted that Briggs Scotland was the contractor seeking cover and that a cover price was provided by Pirie. Although Mr Thomson does not specifically state that Walker provided a cover price, he has noted that Walker did not want to win the contract because it was too big for them to handle. The OFT considers that this statement, along with the evidence from Briggs, establishes that Walker did in fact submit a cover price.
310. With regard to Lenaghen's involvement, Lenaghen did not submit a bid for this contract. The OFT is of the view that the evidence from Briggs that a cover price was provided by Lenaghen on this occasion is insufficient to establish that Lenaghen did provide a cover price.

The participants' representations

311. No representations regarding this contract were made by any of the Parties.

The OFT's conclusions

312. In the absence of any contradictory statements from the participants, the OFT concludes that the totality of the evidence,³²⁷ as analysed at paragraphs 308 to 311 above, establishes that an agreement and/or concerted practice was in place between Briggs Scotland, Pirie, and Walker, in breach of the Chapter I prohibition, which had the object of fixing tender prices in relation to the tenders submitted by each undertaking for the Glasgow College of Nautical Studies contract.

xii. Hamilton Town Hall

Analysis of evidence

313. The OFT considers that the words, "Attached please find copy of our quotation for the **Mastic Asphalt** work at the above site, as discussed" together with, "As usual, these are **OUR RATES**" from Pirie (at paragraph 168 above), establish that Pirie and Walker intended to submit non-competitive tenders in relation to the work required for Hamilton Town Hall. In particular, Pirie was seeking Walker's agreement that Walker would submit a higher bid.
314. The OFT's conclusion is supported by the witness statement of Mr John Thomson of Walker that the latter was requested to submit a cover price by Pirie and that the rates set out in their fax were Pirie's. Walker admitted that it submitted a higher bid, and inflated various figures, as

³²⁷ *Replica Kits*, paragraph 206 and *Toys*, paragraphs 164-165.

seen in manuscript on pages two to four of the fax set out in paragraph 168 above.

315. Although the evidence provided by Pirie referred to in paragraph 171 is incomplete, the OFT is of the view that the fact that Pirie did not complete the table is due to the fact that Pirie could not recall the outcome of this bid, as it is unclear whether this bid was ever awarded.

The participants' representations

316. No representations regarding this contract were made by any of the Parties.

The OFT's conclusions

317. In the absence of any contradictory statements from the participants, the OFT concludes that the totality of the evidence,³²⁸ as analysed at paragraphs 313 to 316 above, establishes that an agreement and/or concerted practice was in place between Pirie and Walker, in breach of the Chapter I prohibition, which had the object of fixing tender prices in relation to the tenders submitted by each undertaking for the Hamilton Town Hall contract.

I. The OFT's conclusions on the individual agreements or concerted practices

318. On the basis of the facts, evidence and representations set out at paragraphs 57 to 171 and analysed at paragraphs 225 to 317 above, the OFT finds that the Parties entered into certain individual agreements and/or concerted practices with the object of fixing prices through collusive tendering in relation to individual contracts as set out above.

J. Prevention, restriction or distortion of competition

- i. Introduction: the effect of the procurement process on competition in the relevant market

319. The OFT has considered the important issue of the procurement process in the roofing contracting sector and how this affects competition within the relevant market.

320. The OFT notes that services in this market are procured through a tendering process, which involves local authorities and private managing agents, architects or surveyors inviting contractors to submit bids. Any undertaking with expertise in repairing flat roofs within a reasonable distance of the contract location might feasibly tender for a contract. However, buyers (local authorities or managing agents) will usually short-list a number of firms from their standing lists of suitable contractors.

321. Where the original tendering process fails to identify a suitable contractor on the short list, customers may consider alternative contractors. In such

³²⁸ *Replica Kits*, paragraph 206 and *Toys*, paragraphs 164-165.

circumstances, different undertakings can be approached, but only if they are already included on the appropriate standing lists. Often local authorities do not look beyond their short list, (i.e. they do not consider other suppliers on the relevant standing list), even if all the original bids are deemed unaffordable or unsuitable. This is because procedures typically allow for negotiation where the buyer gets its budgeted price but compromises are made on the specification for the job.

322. Furthermore, the ability of different contactors to be included on standing lists is restricted by a number of different factors. In particular, firms would need to demonstrate:

- i. Specialist roofing skills;
- ii. Adequate insurance coverage;
- iii. A good health and safety record; and
- iv. Relevant product/manufacture guarantees.

323. This suggests that, in the absence of collusion, the most effective competition in the product market would be those suppliers on the relevant standing list, and in particular those on the relevant short lists for the supply of installation, repair, maintenance and improvement services for mastic asphalt coverings for flat roofs (and other flat surfaces) in Scotland.

- ii. Consideration of whether the agreements and/or concerted practices in this case had the object or effect of preventing, restricting or distorting competition

324. Section 2(1) of the Act prohibits, *inter alia*;

“agreements between undertakings...or concerted practices which...have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom.”

325. Accordingly, in light of the specific wording of section 2(1), the OFT is not, as a matter of law, obliged to establish that an agreement or concerted practice has an anti-competitive **effect** where it is found to have as its **object** the prevention, restriction or distortion of competition.³²⁹

326. In considering whether an agreement and/or concerted practice has as its object the prevention, restriction or distortion of competition, the OFT will consider the aims of the agreement and/or concerted practice in the economic context in which it operates. The OFT's assessment of the aims of the agreement and/or concerted practice is determined by an objective assessment of the meaning and purpose of the agreement, rather than by any consideration of the subjective intention of the Parties when entering into the agreement and/or concerted practice. In this respect the OFT takes

³²⁹ The ECJ has acknowledged this principle on many occasions in relation to the interpretation of Article 81(1). In *Consten & Grundig v European Commission* [1996] ECR 299 it stated that 'there is no need to take account of the concrete effects of an agreement once it has as its object the prevention, distortion or restriction of competition.' This was confirmed by the CAT in *Toys*, paragraph 357.

the view that, if the obvious consequence of an agreement and/or concerted practice is to prevent, restrict or distort competition, that will be its object notwithstanding that it may have other aims as well.

327. Section 2(2) of the Act states that the Chapter I prohibition applies, in particular, to agreements and/or concerted practices which:

'...directly or indirectly fix...selling prices..[and]...share markets or sources of supply.'

328. Accordingly, any provision in an agreement and/or concerted practice which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, fixes the prices at which goods or services are sold, or shares markets or sources of supply, will amount to an infringement of the Chapter I prohibition.³³⁰ As discussed above at paragraph 207, the fact that a party attended a meeting reluctantly, or had no intention of putting into practice any agreement (without distancing itself from the agreement), or did not, in fact, implement the agreement, is not relevant to the finding of an infringement.

329. Moreover, the CAT held in *Toys II*³³¹ that:

' It is trite law that once it is shown that such agreements or practices had the object of preventing, restricting, or distorting competition, there is no need for the OFT to show what the actual effect was: see Cases 56 and 58/64 Consten and Grundig v Commission [1966] ECR 299, 342 and many subsequent cases.'; and

'[i]f an agreement or concerted practice is established on the facts, the question of what the pricing position might have been in the absence of that agreement or concerted practice is irrelevant to the issue of liability.'

330. The conduct of parties in providing, receiving and considering information as to; (a) whether or not they intended to bid; (b) whether they were amenable to submitting a cover price and/or; (c) the prices at (or above) which a cover bid should be set amounts to a concerted practice which has as its object the prevention, restriction or distortion of competition. The CAT stated in *WM Roofing I*³³²:

"[T]he concerted practice is made out at a stage prior to consideration of whether the person receiving the price actually puts in a tender."

331. During the course of the OFT's investigation certain Parties asserted that the desire to stay on standing lists (as described at paragraph 323) was a primary consideration when submitting a cover bid. This explanation was considered and found to be immaterial by the CAT in *WM Roofing I*.³³³

³³⁰ See also the section in this Decision on appreciability at paragraphs 333 to 335 below.

³³¹ *Toys II judgment*, at paragraphs 357 and 708.

³³² *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, at paragraph 236.

³³³ *Ibid*, at paragraph 250.

"The Tribunal does not accept that this explanation [i.e. to stay on tender lists] for Apex's conduct absolves Apex of liability. Concertation the object of which is to deceive the tenderee into thinking that a bid is genuine when it is not, plainly forms part of the mischief which section 2 of the Act is seeking to prevent. The subjective intentions of a party to a concerted practice are immaterial where the obvious consequence of the conduct is to prevent, restrict or distort competition."

332. The OFT therefore takes the view that the agreements and/or concerted practices referred to in this Decision had as their obvious and intended consequence the fixing of prices, and, therefore, had as their object the prevention, restriction or distortion of competition.

K. Appreciability

333. An agreement and/or concerted practice will infringe the Chapter I prohibition if it has as its object or effect the appreciable prevention, restriction or distortion of competition in the UK. The OFT takes the view that an agreement and/or concerted practice will generally have no appreciable effect on competition if the aggregate market share of the parties to the agreement and/or concerted practice does not exceed 10 per cent of the relevant market affected by the agreement where the agreement is made between competing undertakings (i.e. undertakings which are actual or potential competitors on any of the markets concerned).³³⁴

334. However, there will be circumstances where this is not the case. The OFT will generally regard any agreement and/or concerted practice which directly or indirectly fixes prices as being capable of having an appreciable effect even where the parties' combined market share falls below the 10 per cent threshold.³³⁵

335. The agreements and/or concerted practices referred to in this Decision were price-fixing arrangements and are therefore considered by the OFT to have an appreciable effect on competition whether or not the Parties' combined market share in the relevant market falls below 10 per cent. The OFT therefore takes the view that the agreements and/or concerted practices specified in this Decision prevent, restrict or distort competition to an appreciable extent.³³⁶

L. Effect on trade within the UK

336. For the purposes of the Chapter I prohibition, the UK includes any part of the UK where an agreement and/or concerted practice operates or is intended to operate. By their very nature, agreements and/or concerted practices to fix prices restrict competition and are likely to affect trade. It should be noted that, to infringe the Chapter I prohibition, an agreement

³³⁴ From 1 May 2004, the OFT has regard to the EC thresholds on appreciability in determining whether there is an appreciable effect on competition - see European Commission Notice on Agreements of Minor Importance (OJ C368, 22.12.01, p13) and the OFT Guideline 401 'Agreements and Concerted Practices', December 2004, paragraphs 2.16-2.19.

³³⁵ OFT Guideline 401 'Agreements and Concerted Practices', December 2004, paragraph 2.17.

³³⁶ The OFT does not consider the agreements and/or concerted practices produce only insignificant effects in the sense outlined in Case 5/69 *Völk v Vervaeke* [1969] ECR 295.

and/or concerted practice does not actually have to affect trade as long as it is capable of affecting trade. Moreover, the effect on trade within the UK is a purely jurisdictional test to demarcate the boundary line between the application of Community competition law and national competition law; the test is not read as importing the requirement that the effect on trade should be appreciable.³³⁷

337. The agreements and/or concerted practices entered into by the Parties operated in a part of the UK – Scotland - and the Parties' conduct is therefore considered by the OFT to have affected trade within the UK. The Parties' price-fixing agreements and/or concerted practices were capable of altering the structure of competition in a part of the UK by reducing and, in some instances, removing competition from the competitive tendering process³³⁸.

M. Conclusion on application of the Chapter I prohibition

338. The OFT concludes on the basis of the strong and compelling evidence set out at paragraphs 57 to 171 above that the Parties infringed the Chapter I prohibition by forming a series of individual agreements and/or concerted practices each of which had as its object the fixing of prices, in the market for the supply of installation, repair, maintenance and improvement services for mastic asphalt coverings for flat roofs (and other flat surfaces) in Scotland.

III. DECISION

A. Agreements and/or concerted practices

339. The evidence set out at Part I of this Decision formed the basis of the Statement of Objections sent to the Parties. The OFT's assessment of the views set out in the Parties' representations to the OFT is set out in Part II of this Decision. Having considered carefully the evidence and analysed the views set out in the representations by Briggs, Pirie and Lenaghan, the OFT finds that there were agreements and/or concerted practices between the participants in each contract particularised in Part II³³⁹ above to fix the prices of the supply of certain flat roofing services by collusive tendering in relation to the contracts particularised in Part II above.

340. On the basis of the evidence available, set out at paragraphs 57 to 171 above, the OFT has considered the relevant duration for each of the infringements for the Parties. The OFT considers that the duration of infringements of this nature is at least from the date of initial contact between parties, alerting one another that they had been invited to tender and were either interested in winning the tender or in making bids that would ensure they would not win the tender, to the date when bids were submitted. In cases involving allocation of multiple contracts between

³³⁷ See the final judgment of the CAT in *Aberdeen Journals* [2003] CAT 11, at paragraphs 459 and 460.

³³⁸ Section 2(7) of the Act catches agreements or concerted practices which "may affect trade".

³³⁹ See paragraphs 57 to 171 above.

different parties, where the dates for submission of those tenders varied, the relevant date is that for submission of the latest tender.

341. The nature of the initial contacts, which are often oral, coupled with the fact that tender documentation is not always retained beyond the end of the tender process mean that the OFT does not always have precise information as to either or both of the dates in respect of each infringement. In the cases where such information is available, the dates in question are usually separated by a matter of days or weeks. On the basis of the evidence set out at paragraphs 57 to 171 above, the OFT is aware of no evidence to suggest that the period between initial contact and submission of tender bids was, in relation to any of the infringements particularised in Part II of this Decision, greater than one year in length.

342. In any event, the OFT considers that the concept of duration is generally speaking of less significance in bidding markets compared to fixed-price markets. As the CAT stated in *WM Roofing I*³⁴⁰:

'[I]n the present case, the effect of the infringement is not restricted to the short period referred to above but has a potential continuing impact on future tendering processes by the same tenderers. Moreover, in relation to tenders we bear in mind the specific nature of a tender process: once a contract has been awarded following an anti-competitive tender, the anti-competitive effect is irreversible in relation to that tender. The contract has been awarded; the contract works will in all likelihood have commenced. It is readily apparent that this is not a case where ongoing conduct may simply be rectified.'

343. Certain of the Parties have made representations to the effect that the infringements were made on a 'one off' basis and were not in any way part of a pattern or standing agreement.³⁴¹ The OFT notes that whilst certain of the Parties have been found to have participated in more than one of the infringements particularised in Part II above, the OFT has no evidence that these incidents of collusive tendering formed part of an overall scheme whereby contracts were allocated between members of a cartel on an ongoing basis.

344. The OFT therefore considers that each of the infringements particularised in Part II above lasted for less than one year.

B. Action

345. This section sets out the action that the OFT has decided to take and its reasons for it.

i. Directions

346. Section 32(1) of the Act provides that if the OFT has made a Decision that an agreement infringes the Chapter I prohibition, it may give to such person or persons as it considers appropriate such directions as it considers appropriate to bring the infringement to an end. As the OFT is satisfied

³⁴⁰ *WM Roofing I* judgement, at paragraph 278.

³⁴¹ For example, Hylton's written response, dated 31 December 2004, to the Statement of Objections and Roofclad's written response, dated 2 December 2004, to the Statement of Objections.

that the infringements particularised in Part II of the Decision have come to an end, the OFT is not issuing any directions in this case.

ii. Financial penalties – general points

347. Section 36(1) of the Act provides that, on making a Decision that an agreement³⁴² and/or concerted practice has infringed the Chapter I prohibition, the OFT may require a party to the agreement to pay it a penalty in respect of the infringement. No penalty which has been fixed by the OFT may exceed 10 per cent of the turnover of the undertaking calculated in accordance with the provisions of the Competition Act 1998 (Determination of Turnover for Penalties Order) 2000 as amended ('the Penalties Order').³⁴³ The OFT considers that the parties to each infringing agreement and/or concerted practice are as set out in the OFT's conclusions in relation to each infringement, set out in the OFT's analysis at paragraphs 225 to 317 above.
348. The OFT may impose a penalty on an undertaking that has infringed the Chapter I prohibition only if it is satisfied that the infringement has been committed intentionally or negligently, but is under no obligation to determine specifically whether there was intention or negligence.³⁴⁴
349. In the present case, the OFT considers that the Parties would in all likelihood have made tender applications before and either would have, or ought to have been, aware that the purpose of conducting tenders is to ensure competition in the award of contracts. The OFT further notes anecdotal evidence that it is not uncommon for an individual organising a tender procedure to require the parties invited to tender to complete a detailed non-collusion statement confirming that the tender submitted is a competitive offer and that there have been no undue contacts with any competing company in connection with the tender offer e.g. in the Ailsa Craig Lighthouse contract. However, the OFT does not believe that it is necessary to show that a party completed such a non-collusion statement for the OFT to find that this party infringed the Chapter I prohibition intentionally or negligently. The OFT considers that, in the light of these facts and the very nature of the agreements and/or concerted practices, the Parties could not have been unaware that the agreements and/or concerted practices to which they were party had the object of preventing, restricting or distorting competition. The OFT is therefore satisfied that the Parties intentionally or negligently infringed the Chapter I prohibition.

³⁴² Section 2(5) of the Act states: "a provision of this Part which is expressed to apply to, or in relation to, an agreement is to be read as applying equally to, or in relation to, ... a concerted practice (but with any necessary modifications)." As such, where this section of the Decision includes references to agreements taken from the Act or associated statutory instruments, those references should be taken to refer also to concerted practices.

³⁴³ Section 36(8) of the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (SI 2000/309), as amended by the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004 (SI 2004/1259).

³⁴⁴ Section 36(3) of the Act: see *Napp Pharmaceutical Holdings Limited and subsidiaries v Director General of Fair Trading* [2002] CAT 1, at paragraph 455.

IMMUNITY FROM PENALTIES

350. Section 39(3) of the Act provides that a party to a small agreement is immune from the effect of section 36(1). This is defined, pursuant to section 39(1) and the Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000,³⁴⁵ as an agreement between undertakings the combined applicable turnover of which for the business year ending in the calendar year preceding the one during which the infringement occurred does not exceed £20 million.³⁴⁶
351. However, by virtue of section 39(1)(b), a price fixing agreement may not constitute a 'small agreement' for the purposes of the Act. Accordingly, none of the Parties will benefit from immunity from penalties under section 39 (3).³⁴⁷

CALCULATION OF PENALTIES – GENERAL POINTS

352. In accordance with section 38(8) of the Act, the OFT must have regard to the guidance on penalties issued under section 38(1) of the Act for the time being in force when setting the amount of the penalty.³⁴⁸

Step 1 – starting point

353. The starting point for determining the level of penalty is calculated having regard to the seriousness of the infringement and the relevant turnover of the undertaking.³⁴⁹ The 'relevant turnover' is the turnover of the undertaking in the relevant product market and relevant geographic market affected by the infringement in the last business year.³⁵⁰ The last business year is the business year preceding the date of the Decision.³⁵¹ The starting point is formulated as a percentage rate of each undertaking's relevant turnover, up to a maximum of 10 per cent.³⁵² Whilst the OFT is not required to formulate the starting point as a percentage rate of each undertaking's relevant turnover, in this case a percentage rate, reflecting the seriousness of the offence and applied to each undertaking's relevant turnover, is considered to be an appropriate way of having regard both to seriousness and the relevant turnover of each undertaking.
354. The actual percentage rate which is applied to the relevant turnover depends upon the nature of the infringement. The more serious and widespread the infringement, the higher the likely percentage rate.³⁵³

³⁴⁵ SI 2000/262.

³⁴⁶ See footnote 342 above.

³⁴⁷ See footnote 342 above.

³⁴⁸ The OFT's guidance as to the appropriate amount of a penalty, OFT 423, December 2004.

³⁴⁹ *Ibid.*, at paragraph 2.3.

³⁵⁰ *Ibid.*, at paragraph 2.7.

³⁵¹ Penalties Order, Article 3.

³⁵² The OFT's guidance as to the appropriate amount of a penalty, OFT 423, December 2004, paragraph 2.8.

³⁵³ *Ibid.*, at paragraph 2.4.

When making its assessment, the OFT will consider a number of factors, including the nature of the product, the structure of the market, the market share(s) of the undertaking(s) involved in the infringement, and the effect on competitors and third parties. The damage caused to consumers whether directly or indirectly will also be an important consideration.³⁵⁴

Nature of infringement

355. The OFT has imposed a penalty on the Parties. The starting point for each penalty is based on the fact that the agreements or concerted practices in this case are related to collusive tendering. Collusive tendering is a form of price-fixing and is a very serious infringement of the Chapter I prohibition. The usual starting point for each penalty in such a case is likely to be at or near 10% of relevant turnover.³⁵⁵

356. The OFT considers that the most serious example of collusive tendering would be a cartel where collusion in relation to individual contracts was part of an overall scheme that was centrally controlled and orchestrated by the participants with on the face of it unrelated contracts allocated between members of the cartel. The OFT does not have evidence of such an overall arrangement in this case.

357. The OFT notes that certain of the instances of cover pricing dealt with in this Decision are individual, discrete infringements, whereby collusive tendering results in the submission of uncompetitive tender bids. These are considered to be less serious forms of collusive tendering.

Nature of product

358. Mastic asphalt roof coverings are among a number of available types of roof coverings but because of a basic difference in materials and technology, purchasers that need services carried out on flat roofs will have only a limited ability (or none at all) to substitute employing the services of a contractor that can carry out that kind of work in relation to other types of flat roofs.³⁵⁶

359. The values of the contracts covered by this Decision ranged from approximately £20,000 to over £350,000. The relatively small size of many of the contracts in question is a relevant factor when assessing the seriousness of the infringement for the purposes of determining the starting point.

Structure of market

360. The market consists of contractors able to supply installation, repair, maintenance and improvement services for mastic asphalt coverings for flat roofs (and other flat surfaces) in Scotland. As noted at paragraph 35 above, there is a high degree of fragmentation in the roofing contracting

³⁵⁴ *Ibid.*, at paragraph 2.5.

³⁵⁵ *Ibid.*, at paragraph 2.4.

³⁵⁶ See paragraphs 178 to 202 above.

industry as a whole with some 74 per cent of companies commanding a turnover of less than £250,000 in 2002. The mastic asphalt roofing market in Scotland is therefore likely to be fragmented.

361. Local authorities are significant purchasers of installation, repair, maintenance and improvement services for mastic asphalt coverings for flat roofs (and other flat surfaces) that the Parties supply. Some of the Parties told the OFT that there was perceived pressure in the industry for suppliers to put in tender bids even when they did not wish to win the contract because otherwise there was the risk of not being invited to tender in the future. However, a desire to maintain relationships with customers (or their agents) does not diminish each supplier's obligations to maintain independence from its competitors as a separate economic operator.³⁵⁷ All undertakings are independently free to adopt a business strategy which involves submitting bids at prices which they would not expect to win the contract. However, the Chapter I prohibition provides that contacts between competitors are prohibited where they have the object or effect of ensuring that bids submitted do not genuinely compete. In the OFT's view the fact that the Parties may have had motives such as staying on tender lists, which led to their contact with competitors, does not in any way affect the OFT's assessment of the seriousness of the infringements.

Market share of undertakings involved

362. Although detailed statistical data about the market for the supply of installation, repair, maintenance and improvement services for mastic asphalt coverings for flat roofs (and other flat surfaces) is unavailable, the OFT considers the fact that the UK roofing industry as a whole³⁵⁸ is so fragmented (see paragraph 35 above) suggests that none of the Parties has a major UK market share in the market for the supply of installation, repair, maintenance and improvement services for mastic asphalt coverings for flat roofs (and other flat surfaces) in Scotland (although it should be noted that Briggs is, in the roofing market as a whole, a leading player.)³⁵⁹

Effect on customers, competitors and third parties

363. The Parties identified in the Decision constitute a not insignificant part of suppliers of installation, repair, maintenance and improvement services for mastic asphalt coverings for flat roofs (and other flat surfaces) in Scotland. Also, the OFT has been informed in the context of a previous investigation that "cover pricing is endemic in the construction industry in general including the roofing industry".³⁶⁰ The Parties' infringements gave purchasers of flat-roofing services the impression that there was more

³⁵⁷ See paragraph 212 above.

³⁵⁸ See paragraphs 22 onwards above for an overview of the UK contracting services market.

³⁵⁹ Mintel Roofing Materials & Contracting (Industrial Report) - UK - January 2004, paragraph 5.3.7.

³⁶⁰ See Decision No CA98/1/2003 - Collusive tendering in relation to contracts for flat roofing services in the West Midlands, March 2004 (Case CP/0001-02), paragraph 394.

competition in the tender process relating to a specific contract than there actually was. As a result it was not possible for those customers to ascertain whether the tenders received were a competitive price or not. The OFT further notes that the foreseeable effect of the restriction or, in some cases, complete removal of competition from the tender process will lead on average to higher (i.e. more costly) winning bids giving rise to allocative inefficiencies in that market and more generally. It is not, however, possible for the OFT to quantify the amount of any loss caused to customers (and to the extent those customers are public bodies, ultimately tax payers) as a result of the collusive tendering.

364. The OFT, however, notes that the instances of cover pricing dealt with in this Decision are individual, discrete infringements. The OFT considers that a more serious example of collusive tendering would be cartels where collusion in relation to individual contracts was part of a single overall scheme that was centrally controlled and orchestrated by the participants with contracts allocated between members of the cartel. Equally, the OFT considers that cartels where participants made inducements to other cartel participants to persuade them to submit false bids in order to make substantial financial gains from their activities are more serious than the type of collusive tendering in which the Parties were involved.
365. The OFT has had regard to the nature of the product, the structure of the market, the market share of the Parties and the effect of the infringements on competitors and third parties, as set out in paragraphs 57 to 171 above. The OFT considers that (a) the market is fragmented (see paragraph 35 above); (b) none of the Parties has a leading market share (paragraph 362); and (c) the Parties' infringements were - by virtue of the fact that they were individual, discrete infringements - not the most serious examples of collusive tendering (in that no compensation was paid by the party who won the bid to the other parties). Therefore, the OFT has fixed a starting point of [...] [C] per cent of relevant turnover for all the Parties.

Step 2- adjustment for duration

366. The starting point may be adjusted to take into account the duration of the infringement.³⁶¹ As noted at paragraph 344 above, the duration of each of the infringements in this Decision is calculated by the OFT to be less than a year. Having regard to the specific nature of tender procedures discussed at paragraphs 360 to 361 above, the OFT does not believe that the fact that the bid-rigging arrangements lasted for significantly less than one year should lead to any downward adjustment in the penalties imposed.
367. In its judgment in *WM Roofing I*,³⁶² in considering the duration of collusive tendering practices similar in nature to those particularised in this Decision, the CAT stated:

³⁶¹ The OFT's guidance as to the appropriate amount of a penalty, OFT 423, December 2004, at paragraph 2.10.

³⁶² *WM Roofing I* judgment, at paragraph 278

"We consider, therefore, that the OFT's decision not to make any adjustment for duration in the circumstances of this case was appropriate and reasonable."

368. Therefore, the OFT will not adjust any of the penalties either downwards or upwards in this case for duration.

Step 3 – adjustment for other factors

369. The penalty may be adjusted as appropriate to achieve policy objectives, particularly deterring undertakings (including non-infringing undertakings) from engaging in anti-competitive practices, such as collusive tendering. Considerations at this stage may include the OFT's estimate of any economic or financial benefit made by the infringing undertakings from the infringement(s), and the special characteristics, including the size and financial position of the undertakings in question.³⁶³

370. A number of Parties have commented during the investigation on their perceived lack of financial gain from the infringements. However in this case, the OFT considers that it would be difficult to estimate any gain that the Parties have achieved through their collusive actions in relation to the contracts that formed the subject matter of the infringements. Potential gains may be derived not only from the contracts in question (through higher margins), but also from alterations to the ongoing relationships with customers. Moreover, the arithmetical calculation of gain should not form the sole or even the primary means of assessing the seriousness of an infringement except in the clearest cases.³⁶⁴

371. As noted in paragraph 363 above, and in a previous decision of the OFT³⁶⁵, collusive tendering has been widespread in the roofing industry. As will be clear from this Decision, the OFT considers that collusive tendering is one of the most serious infringements of the Act. The OFT therefore considers that it is necessary to deter undertakings in this area from engaging in collusive tendering.

372. The financial penalty calculated at the end of Step 2 of the calculation procedure may represent a relatively low proportion of an undertaking's total turnover, for example where the undertaking in question has significant operations in other markets. In such a case, the OFT considers that the penalty figure reached at the end of Step 2 may not represent a significant sum for that party, and it will therefore be necessary to increase the party's penalty at Step 3 to arrive at a sum that represents, for that party, a significant amount that will act as a sufficient deterrent, having regard to the seriousness of the infringement(s) and the party's total turnover. These points are considered in relation to each Party, below.

³⁶³ *Ibid.*, paragraph 2.11.

³⁶⁴ *Napp Pharmaceutical Holdings Limited and subsidiaries v Director General of Fair Trading* [2002] CAT 1, at paragraph 511.

³⁶⁵ See *The West Midlands Roofing Decision*, referred to above, at paragraph 394.

373. In relation to the size of the undertakings in question, the OFT recognises that some Parties are larger than others but notes that this factor will be reflected when account is taken of relevant turnover applying a percentage rate starting point as described in paragraph 365 above. In addition, for large companies for whom relevant turnover constitutes a relatively small percentage of total turnover, adjustments may be made as described in paragraph 369 above to ensure that the financial penalties represent a significant sum for such Parties. As a result, and taking into consideration the seriousness of the infringements, the OFT considers that no downward adjustment for smaller parties would be appropriate at this stage.
374. In relation to the financial position of the undertakings, the OFT notes that financial position is a relevant consideration in the context of determining whether the sum reached at the end of Step 2 is an appropriate amount for deterrence, not only in relation to the party in question but also in relation to third parties who may consider engaging in anti-competitive activities.

Step 4 – adjustment for aggravating and mitigating factors

375. The OFT has the power to increase the penalty where there are other aggravating factors, or decrease it where there are mitigating factors.³⁶⁶ The OFT considers these points in relation to each undertaking, below.
376. The OFT notes here that where parties have committed repeated infringements, it constitutes an aggravating factor under this Step of the penalty calculation procedure. The magnitude of the penalty is therefore adjusted to reflect the number of infringements each party has committed. In deciding on the appropriate amount of the increase for multiple infringements, the OFT will ensure that any adjustment is fair and proportionate between all parties. When assessing the appropriate amount of the increase, the OFT therefore has regard to the absolute frequency of infringements by each party and the relative frequency of such infringements as between the parties in relation to the relevant market. Moreover, the OFT will also have regard to whether, in its opinion, there are significant qualitative differences between discrete infringements that should be reflected in any fine set by the OFT. In the circumstances of the present case, the OFT has decided to increase the fines by multiples of 10 per cent where a Party has committed 2 or more infringements, as set out in the table below:

Number of Infringements	Increment
1	none
2	10%
3	20%
4	30%
5	40%
6	50%
7	60%
8	70%
9	80%

³⁶⁶ *Ibid.*, at paragraph 2.14.

Number of Infringements	Increment
10	90%
11	100%

377. The OFT also notes that the role of an undertaking as a leader in, or an instigator of, the infringement may be an aggravating factor.³⁶⁷ Although one Party³⁶⁸ has implicated Briggs as the instigator, the OFT considers that “instigation” in this context is something more than mere initiation of collusion by being the first party to make contact with others or the first to suggest collusion in relation to a specific contract. Therefore, given the contradictory nature of the evidence on this point, the OFT has made no findings in relation to any of the contracts in this decision that any Party had a role as a leader in or instigator of an infringement.

Step 5 – adjustment to prevent the maximum penalty from being exceeded and to avoid double jeopardy

378. The OFT may not fix a penalty that exceeds 10 per cent of the worldwide turnover of the undertaking in its last business year, calculated in accordance with the provisions of the Penalties Order.³⁶⁹ The section 36(8) turnover is not restricted to the turnover in the relevant product market and relevant geographic market.³⁷⁰ The OFT considers below, in relation to each undertaking, whether any penalty would exceed 10 per cent of the section 36(8) turnover.

379. In addition, where an infringement of the Chapter I prohibition ended prior to 1 May 2004, any penalty must, if necessary, be further adjusted to ensure that it does not exceed the maximum penalty applicable prior to 1 May 2004, i.e. 10 per cent of turnover in the United Kingdom of the undertaking in the financial year preceding the date when the infringement ended.³⁷¹

380. Also, the OFT must when setting the amount of its penalty for a particular agreement (or concerted practice) take into account any penalty or fine that has been imposed by the European Commission or by a court or other body in another Member State in respect of the same agreement (or concerted practice).³⁷²

³⁶⁷ *Ibid.*, at paragraph 2.15.

³⁶⁸ Paragraph 4 of Pirie's written representations dated January 2005, in response to the Statement of Objections.

³⁶⁹ Section 36(8) of the Act and Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (SI 2000/309), as amended by the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004 (SI 2004/1259).

³⁷⁰ The OFT's guidance as to the appropriate amount of a penalty, OFT 423, December 2004, at paragraph 2.17.

³⁷¹ *Ibid.*, at paragraph 2.18.

³⁷² *Ibid.*, at paragraph 2.20.

iii. Penalty for Briggs

Step 1 – starting point

381. Briggs was involved in 5 infringements:

- Access Walkways, which the OFT considers came to an end in September 2000;
- Asda Stores, which the OFT considers came to an end in May 2001;
- Cardinal Newman High School, which the OFT considers came to an end in April 2001;
- BT Extension, which the OFT considers came to an end in September 2000; and
- Glasgow College of Nautical Studies contracts, which the OFT considers came to an end in July 2001.

382. Briggs' financial year is 1 January to 31 December. Briggs' turnover in the relevant product and geographic markets in the business year preceding the date of this Decision (1 January to 31 December 2004) was [...] [C].

383. The OFT has made an analysis of its findings regarding the seriousness of this infringement at paragraphs 353 to 365 above and fixed the starting point for all the Parties at [...] [C] per cent of relevant turnover. The starting point for Briggs is therefore [...] [C].

Step 2 – adjustment for duration

384. In accordance with paragraphs 366 to 368 above, the OFT does not make any adjustment for duration.

Step 3 – adjustment for other factors

385. As noted at paragraphs 369 and 371 above, the OFT considers that it is necessary to deter undertakings in this area from engaging in collusive tendering. The OFT's investigation in this case has already raised the profile of competition issues in the industry and the OFT intends this Decision to raise awareness of these issues within the industry further. In accordance with paragraph 372, the penalty for Briggs at the end of Step 2 does not represent a significant sum for Briggs because both that sum and the relevant turnover taken into account at Step 1 each represent a relatively low proportion of Briggs' total turnover in the year preceding this Decision. However, in an earlier decision relating to collusive tendering in the flat roofing sector,³⁷³ an additional sum was included in Briggs' penalty in order to deter Briggs and other undertakings from engaging in collusive tendering. In recognition of the fact that Briggs has already faced deterrent in a similar market within the same sector, the OFT does not therefore propose to increase the amount of the penalty for Briggs at this stage.

³⁷³ See the West Midlands Roofing Decision, referred to at footnote 48 above.

Step 4 – adjustment for aggravating and mitigating factors

Aggravation

386. As noted at paragraph 376 above, the OFT will treat repeated infringements as an aggravating factor under this Step. Briggs was involved in collusive tendering in connection with 5 infringements: Access Walkways; Asda Stores; Cardinal Newman School; BT Extension; and Glasgow College of Nautical Studies. The OFT therefore increases the penalty for Briggs by [...] [C] per cent.
387. The OFT is aware that there was involvement on the part of directors and senior managers of Briggs.³⁷⁴ The OFT considers this an aggravating factor and increases the penalty by [...] [C] per cent.

Mitigation

388. The OFT is aware of the internal investigation into anti-competitive activities undertaken by Briggs and the remedial action taken by Briggs since its discovery of the infringement. Briggs has advised its staff, directors and senior managers in detail upon the provisions of the Act and has committed to following a competition law compliance programme.³⁷⁵ The OFT considers that in the light of all these factors it is appropriate to reduce the penalty by [...] [C] per cent.
389. Although Briggs co-operated with the OFT during the course of the investigation, this was a condition of its being granted leniency and so no extra mitigation is given for this factor.
390. The total percentage added to the penalty for aggravating circumstances is [...] [C] per cent and the total percentage deducted for mitigating circumstances is [...] [C] per cent. As a result of this Step, the total adjustment to be made to the penalty having considered aggravating and mitigating circumstances is [...] [C] of [...] [C] per cent. The financial penalty will therefore be £57,120 subject to Step 5.

Step 5 – adjustment to prevent the maximum penalty from being exceeded and to avoid double jeopardy

391. Under section 36(8) of the Act, the maximum financial penalty that the OFT can impose is 10 per cent of the 'section 36(8) turnover' of the undertaking. The 'section 36(8) turnover' is determined in accordance with the Penalties Order and is the amounts derived by the undertaking from the sale of products and the provision of services falling within the undertaking's ordinary activities after deduction of sales rebates, VAT and

³⁷⁴ The OFT is of the view that Briggs was aware of the collusive tendering activities of its Scottish division, Briggs Scotland from a statement provided by Mr A³⁷⁴ (a senior manager of Briggs Scotland) who stated that he was aware of cover bids and that he let it carry on "as instructed by senior [Briggs] management." In addition, Mr B³⁷⁴ (a senior manager of Briggs) stated when asked about the collusive tendering activities by Briggs Scotland, "I was aware of it generally".

³⁷⁵ Contained in Briggs' leniency application.

other taxes directly related to turnover.³⁷⁶ The 'section 36(8) turnover' is taken from the applicable turnover during the business year preceding the date of the decision.³⁷⁷ The applicable turnover for Briggs in the last business year (the year ending 31 December 2004) was £29,607,000. The statutory maximum financial penalty for Briggs is 10 per cent of this figure and is therefore £2,960,700.

392. In addition, where an infringement ended prior to 1 May 2004, any penalty must, if necessary, be further adjusted to ensure that it does not exceed the maximum penalty applicable prior to May 2004, i.e. 10 per cent of turnover in the UK of the undertaking in the financial year preceding the date when the infringement ended.³⁷⁸ The applicable turnover for Briggs in the business year preceding the year in which the first of its infringements ended (the year ending 31 December 1999) was £33,350,000. The statutory maximum financial penalty for Briggs is 10 per cent of this figure and is therefore £3,353,000.
393. The financial penalty calculated at the end of Step 4 does not exceed either of these amounts. There is no double jeopardy because no penalty has been imposed by the European Commission or other relevant body in respect of the infringements.

Leniency

394. Briggs was granted total immunity from financial penalties as part of the OFT's leniency programme. Briggs' financial penalty is therefore reduced to £ nil.
395. The OFT also notes that the role of an undertaking as a leader in, or an instigator of, an infringement may result in that undertaking being ineligible for full immunity.³⁷⁹ Although one Party³⁸⁰ has implicated Briggs as the instigator, given the contradictory nature of the evidence, the OFT has made no findings in relation to any of the contracts in this decision that any Party had a role as a leader in or instigator of an infringement (see paragraph 377 above).
396. The OFT received a written representation from Pirie³⁸¹ that Ruberoid (the parent company of Briggs) has no *locus standi* to apply for leniency on behalf of Briggs, as Ruberoid was not an undertaking participating in the cartel. It is often the case that a parent company will make an application on behalf of itself and all its subsidiaries, as seen in Ruberoid's application

³⁷⁶ Definition of 'applicable turnover' in Article 2 and paragraph 3 of the Schedule to the Penalties Order, as amended.

³⁷⁷ Article 3 of the Penalties Order.

³⁷⁸ See OFT Guideline on an appropriate amount of penalty, December 2004 at paragraph 2.8.

³⁷⁹ See OFT Guideline on an appropriate amount of penalty, December 2004 at paragraph 3.9. Paragraph 3.4 of the previous guideline.

³⁸⁰ Paragraph 4 of Pirie's written representations dated January 2005, in response to the Statement of Objections.

³⁸¹ *Ibid.*

for leniency, and nothing in the Act or related guidelines prohibits this. At the time that a company applies for leniency, the OFT does not necessarily know which parts of the corporate group will ultimately be considered to form the relevant undertaking participating in the cartel. In light of this fact, the OFT considers that the application for leniency by Ruberoid (on behalf if of itself and its subsidiaries) was validly made.

iv. Penalty for Pirie

Step 1 – starting point

397. Pirie was involved in 11 infringements:

- Access Walkways, which the OFT considers came to an end in September 2000;
- Asda Stores, which the OFT considers came to an end in May 2001;
- Cardinal Newman School, which the OFT considers came to an end in April 2001;
- Elderpark Clinic, which the OFT considers came to an end in December 2001;
- Tibetan Centre Phase I, which the OFT considers came to an end in April 2000;
- Tibetan Centre Phase II, which the OFT considers came to an end in January 2002;
- BT Extension, which the OFT considers came to an end in September 2000;
- BBC Studios Glasgow, which the OFT considers came to an end in November 2001;
- Clydeaway Skypark, which the OFT considers came to an end in March 2001;
- Glasgow Nautical College, which the OFT considers came to an end in July 2001; and
- Hamilton Town Hall, which the OFT considers came to an end in July 2002.

398. Pirie's financial year is 1 January to 31 December. Pirie's turnover in the relevant product and geographic markets in the business year preceding the date of this Decision (1 January to 31 December 2003) was [...] [C].³⁸²

399. The OFT has made an analysis of its findings regarding the seriousness of this infringement at paragraphs 353 to 365 above and fixed the starting point for all the Parties at [...] [C] per cent of relevant turnover. The starting point for Pirie is therefore [...] [C].

³⁸² Figures for the financial year ending 31 December 2004 are not available. Accordingly the 2003 financial year end figures will be used when calculating penalties in this Decision.

Step 2 – adjustment for duration

400. In accordance with paragraphs 366 to 368 above, the OFT does not make any adjustment for duration.

Step 3 – adjustment for other factors

401. As noted at paragraphs 369 and 371 above, the OFT considers that it is necessary to deter undertakings in this area from engaging in collusive tendering. The OFT's investigation in this case has already raised the profile of competition issues in the industry and the OFT intends this Decision to raise awareness of these issues within the industry further. The OFT is of the view that the figure reached at the end of Step 2 above is not a significant sum in relation to Pirie because both that sum and the relevant turnover taken into account in Step 1 each represent a relatively low proportion of Pirie's total turnover for the year ending 31 January 2003. In accordance with paragraph 372 above, the OFT therefore considers that, in this instance, the penalty figure of [...] [C] is insufficient to act as an effective deterrent to Pirie and to other undertakings that might consider engaging in collusive tendering. The OFT therefore proposes to increase the amount of the penalty at this stage by an additional [...] [C].

Step 4 – adjustment for aggravating and mitigating factors

Aggravation

402. As noted at paragraph 376 above, the OFT will treat multiple infringements as an aggravating factor under this Step. Pirie was involved in collusive tendering in connection with 11 infringements. The OFT therefore increases the penalty for Pirie by [...] [C] per cent.

403. The OFT is aware that there was involvement of Mr D, a senior manager of Pirie. The OFT considers this an aggravating factor and increases the penalty by [...] [C] per cent.

Mitigation

404. The OFT is aware of the remedial action taken by Pirie since its discovery of the infringements. Pirie has advised its directors and senior managers in detail upon the provisions of the Act and has committed to following a competition law compliance programme.³⁸³ The OFT considers that in the light of all these factors it is appropriate to reduce the penalty by [...] [C] per cent.

405. Although Pirie co-operated with the OFT during the course of the investigation, this was a condition of its being granted leniency and so no extra mitigation is given for these factors.

³⁸³ Paragraph 5 of Pirie's written representations dated January 2005, in response to the Statement of Objections.

406. The total percentage added to the penalty for aggravating circumstances is [...] [C] per cent and the total percentage deducted for mitigating circumstances is [...] [C] per cent. As a result of this Step, the total adjustment to be made to the penalty having considered aggravating and mitigating circumstances is [...] [C] of [...] [C] per cent. The financial penalty will therefore be £114,873 subject to Step 5.

Step 5 – adjustment to prevent the maximum penalty from being exceeded and to avoid double jeopardy

407. Under section 36(8) of the Act, the maximum financial penalty that the OFT can impose is 10 per cent of the 'section 36(8) turnover' of the undertaking. The 'section 36(8) turnover' is determined in accordance with the Penalties Order and is the amounts derived by the undertaking from the sale of products and the provision of services falling within the undertaking's ordinary activities after deduction of sales rebates, VAT and other taxes directly related to turnover.³⁸⁴ The 'section 36(8) turnover' is taken from the applicable turnover during the business year preceding the date of the decision.³⁸⁵ The applicable turnover for Pirie in the last business year (the year ending 31 December 2003) was £7,155,915. The statutory maximum financial penalty for Pirie is 10 per cent of this figure and is therefore £715,592.

408. In addition, where an infringement ended prior to 1 May 2004, any penalty must, if necessary, be further adjusted to ensure that it does not exceed the maximum penalty applicable prior to 1 May 2004, i.e. 10 per cent of turnover in the United Kingdom of the undertaking in the financial year preceding the date when the infringement ended.³⁸⁶ The applicable turnover for Pirie in the business year preceding the year in which the first of its infringements ended (the year ending 31 December 1999) was £8,186,500. The statutory maximum financial penalty for Pirie is 10 per cent of this figure and is therefore £818,650.

409. The financial penalty calculated at the end of Step 4 does not exceed either of these amounts. There is no double jeopardy because no penalty has been imposed by the European Commission or other relevant body in respect of the infringements.

Leniency

410. Pirie was granted a reduction of 55 per cent from financial penalties as part of the OFT's leniency programme, which includes an additional reduction for leniency plus.³⁸⁷ Pirie's financial penalty is therefore reduced to £51,693.

³⁸⁴ Definition of 'applicable turnover' in Article 2 and paragraph 3 of the Schedule to the Penalties Order, as amended.

³⁸⁵ Article 3 of the Penalties Order.

³⁸⁶ *Ibid.*, at paragraph 2.18.

³⁸⁷ The OFT used its discretion in granting Pirie leniency plus under paragraph 3.17 of the OFT's new guidance to the appropriate amount of a penalty (December 2004).

v. Penalty for Walker

Step 1 – starting point

411. Walker was involved in 10 infringements:

- Ailsa Craig Lighthouse, which the OFT has found came to an end in August 2000;
- Asda Stores, which the OFT has found came to an end in May 2001;
- Cardinal Newman High School, which the OFT has found came to an end in April 2001;
- Elderpark Clinic, which the OFT has found came to an end in December 2001;
- Tibetan Centre Phase I, which the OFT has found came to an end in April 2000;
- Tibetan Centre Phase II, which the OFT has found came to an end in January 2002;
- BBC Studios Glasgow, which the OFT has found came to an end in November 2001;
- Clydeaway Skypark, which the OFT has found came to an end in March 2001;
- Glasgow College of Nautical Studies, which the OFT has found came to an end in July 2001; and
- Hamilton Town Hall, which the OFT has found came to an end in July 2002.

412. Walker's financial year is 1 January to 31 December. Walker's turnover in the relevant product and geographic markets in the business year preceding the date of this Decision (1 January to 31 December 2004) was [...] [C].

413. The OFT has made an analysis of its findings regarding the seriousness of this infringement at paragraphs 353 to 365 above and fixed the starting point for all the Parties at [...] [C] per cent of relevant turnover.

Step 2 – adjustment for duration

414. In accordance with paragraphs 366 to 368 above, the OFT does not make any adjustment for duration.

Step 3 – adjustment for other factors

415. As noted at paragraphs 369 and 371 above, the OFT considers that it is necessary to deter undertakings in this area from engaging in collusive tendering. The OFT's investigation in this case has already raised the profile of competition issues in the industry and the OFT intends this

Decision to raise awareness of these issues within the industry further. The OFT is of the view that the figure reached at the end of Step 2 above is not a significant sum in relation to Walker because both that sum and the relevant turnover taken into account in Step 1 each represent a relatively low proportion of Walker's total turnover for the year ending 31 December 2004. In accordance with paragraph 372 above, the OFT therefore considers that, in this instance, the penalty figure of [...] [C] is insufficient to act as an effective deterrent to Walker and to other undertakings that might consider engaging in collusive tendering.³⁸⁸ The OFT therefore proposes to increase the amount of the penalty at this stage by an additional [...] [C].

Step 4 – adjustment for aggravating and mitigating factors

Aggravation

416. As noted at paragraph 376 above, the OFT will treat multiple infringements as an aggravating factor under this Step. Walker was involved in collusive tendering in connection with 10 infringements. The OFT therefore increases the penalty for Walker by [...] [C] per cent.
417. As there was involvement on the part of several senior managers of Walker, Mr John Thomson and Mr James Thomson.³⁸⁹ The OFT considers this to be an aggravating factor and increases the penalty by [...] [C] per cent.

Mitigation

418. The OFT is aware of the remedial action taken by Walker since its discovery of the infringements. Walker has advised its directors and senior managers in detail upon the provisions of the Act and has committed to following a competition law compliance programme.³⁹⁰ The OFT considers that in the light of all these factors it is appropriate to reduce the penalty by [...] [C] per cent.
419. Although Walker co-operated with the OFT during the course of the investigation, this was a condition of its being granted leniency and so no extra mitigation is given for these factors
420. The total percentage added to the penalty for aggravating circumstances is [...] [C] per cent and the total percentage deducted for mitigating circumstances is [...] [C] per cent. As a result of this Step, the total adjustment to be made to the penalty having considered aggravating and mitigating circumstances is [...] [C] of [...] [C] per cent. The financial penalty will therefore be £29,845 subject to Step 5.

³⁸⁸ See paragraph 369 above.

³⁸⁹ The OFT considers that the directors were involved as the evidence in Section II above clearly demonstrates that Mr John Thomson and Mr James Allan Thomson, both senior managers of Walker, were directly involved in the infringements.

³⁹⁰ Walker informed the OFT by letter on 20 February 2003 that Walker has put into place a Competition Law Compliance Policy.

Step 5 – adjustment to prevent the maximum penalty from being exceeded and to avoid double jeopardy

421. Under section 36(8) of the Act, the maximum financial penalty that the OFT can impose is 10 per cent of the 'section 36(8) turnover' of the undertaking. The 'section 36(8) turnover' is determined in accordance with the Penalties Order and is the amounts derived by the undertaking from the sale of products and the provision of services falling within the undertaking's ordinary activities after deduction of sales rebates, VAT and other taxes directly related to turnover.³⁹¹ The 'section 36(8) turnover' is taken from the applicable turnover during the business year preceding the date of the decision.³⁹² The applicable turnover for Walker in the last business year (the year ending 31 December 2004) was [...] [C]. The statutory maximum financial penalty for Walker is 10 per cent of this figure and is therefore [...] [C].
422. In addition, where an infringement ended prior to 1 May 2004, any penalty must, if necessary, be further adjusted to ensure that it does not exceed the maximum penalty applicable prior to 1 May 2004, i.e. 10 per cent of turnover in the United Kingdom of the undertaking in the financial year preceding the date when the infringement ended.³⁹³ The applicable turnover for Walker in the business year preceding the year in which the first of its infringements ended (the year ending 31 December 1999) was [...] [C]. The statutory maximum financial penalty for Walker is 10 per cent of this figure and is therefore [...] [C].
423. The financial penalty calculated at the end of Step 4 does not exceed either of these amounts. There is no double jeopardy because no penalty has been imposed by the European Commission or other relevant body in respect of the infringements.

Leniency

424. Walker was granted a reduction of 45 per cent from financial penalties as part of the OFT's leniency programme. Walker's financial penalty is therefore reduced to £16,415.

vi. Penalty for Lenaghan

Step 1 – starting point

425. Lenaghan was involved in 3 infringements:
- Ailsa Craig Lighthouse, which the OFT considers came to an end in August 2000;

³⁹¹ Definition of 'applicable turnover' in Article 2 and paragraph 3 of the Schedule to the Penalties Order, as amended.

³⁹² Article 3 of the Penalties Order.

³⁹³ *Ibid.*, at paragraph 2.18.

- Access Walkways, which the OFT considers came to an end in September 2000; and
- BT Extension, which the OFT considers came to an end in September 2000.

426. Lenaghan's financial year is 1 January to 31 December. Lenaghan's turnover in the relevant product and geographic markets in the business year preceding the date of this Decision (1 January 2004 to 31 December 2004) was [...] [C].

427. The OFT has made an analysis of its findings regarding the seriousness of this infringement at paragraphs 353 to 365 above and fixed the starting point for all the Parties at [...] [C] per cent of relevant turnover. The starting point for Lenaghan is therefore [...] [C].

Step 2 – adjustment for duration

428. In accordance with paragraphs 366 to 368, above, the OFT does not make any adjustment for duration.

Step 3 – adjustment for other factors

429. As noted at paragraphs 369 and 371 above, the OFT considers that it is necessary to deter undertakings in this area from engaging in collusive tendering. The OFT's investigation in this case has already raised the profile of competition issues in the industry and the OFT intends this Decision to raise awareness of these issues within the industry further. The OFT is of the view that the figure reached at the end of Step 2 above is a significant sum in relation to Lenaghan because both that sum and the relevant turnover taken into account in Step 1 each represent an adequate proportion of Lenaghan's total turnover for the year ending 31 January 2004 (see paragraph 21 above). In accordance with paragraph 372 above, the OFT therefore considers that, in this instance, the penalty figure of [...] [C] is sufficient to act as an effective deterrent to Lenaghan and to other undertakings that might consider engaging in collusive tendering. The OFT does not therefore propose to increase the amount of the penalty at this stage.

Step 4 – adjustment for aggravating and mitigating factors

Aggravation

430. As noted at paragraph 376 above, the OFT will treat multiple infringements as an aggravating factor under this Step. Lenaghan was involved in collusive tendering in connection with the 3 infringements. The OFT therefore increases the penalty for Lenaghan by [...] [C] per cent.

431. As there was involvement on the part of several senior managers of Lenaghen, Mr Charles Lenaghen and Mr Stuart Lenaghen.³⁹⁴ The OFT considers this to be an aggravating factor and increases the penalty by [...] [C] per cent.

Mitigation

432. Lenaghen argues in its representations³⁹⁵ that it became “*unwilling participants in the arrangement as a consequence of a desire to move into the polymer modified mastic asphalt market*”. The OFT does not consider this to be a mitigating factor, as Lenaghen did not provide any evidence of “severe duress or pressure” as defined by paragraph 2.16 of the OFT's guidance as to the appropriate amount of penalty.

433. Although Lenaghen co-operated with the OFT during the course of the investigation, this was a condition of its being granted leniency and so no extra mitigation is given for this factor.

434. The total percentage added to the penalty for aggravating circumstances is [...] [C] per cent and the total percentage deducted for mitigating circumstances is [...] [C] per cent. As a result of this Step, the total adjustment to be made to the penalty having considered aggravating and mitigating circumstances is [...] [C] of [...] [C] per cent. The financial penalty will therefore be £29,607 subject to Step 5.

Step 5 – adjustment to prevent the maximum penalty from being exceeded and to avoid double jeopardy

435. Under section 36(8) of the Act, the maximum financial penalty that the OFT can impose is 10 per cent of the 'section 36(8) turnover' of the undertaking. The 'section 36(8) turnover' is determined in accordance with the Penalties Order and is the amounts derived by the undertaking from the sale of products and the provision of services falling within the undertaking's ordinary activities after deduction of sales rebates, VAT and other taxes directly related to turnover.³⁹⁶ The 'section 36(8) turnover' is taken from the applicable turnover during the business year preceding the date of the decision.³⁹⁷ The applicable turnover for Lenaghen in the last business year (the year ending 31 December 2004) was [...] [C]. The statutory maximum financial penalty for Lenaghen is 10 per cent of this figure and is therefore [...] [C].

436. In addition, where an infringement ended prior to 1 May 2004, any penalty must, if necessary, be further adjusted to ensure that it does not exceed

³⁹⁴ The OFT considers that the directors were involved as the evidence in Section II above clearly demonstrates that Mr Stuart Lenaghen and Mr Charles Lenaghen of Lenaghen, both senior managers, were directly involved in the infringements.

³⁹⁵ Paragraph 5.2 of Lenaghen's written representations dated 5 January 2005, in response to the Statement of Objections.

³⁹⁶ Definition of 'applicable turnover' in Article 2 and paragraph 3 of the Schedule to the Penalties Order, as amended.

³⁹⁷ Article 3 of the Penalties Order.

the maximum penalty applicable prior to 1 May 2004, i.e. 10 per cent of turnover in the United Kingdom of the undertaking in the financial year preceding the date when the infringement ended.³⁹⁸ The applicable turnover for Lenaghan in the business year preceding the year in which the first of its infringements ended (the year ending 31 December 1999) was [...] [C]. The statutory maximum financial penalty for Lenaghan is 10 per cent of this figure and is therefore [...] [C].

437. The financial penalty calculated at the end of Step 4 does not exceed either of these amounts. There is no double jeopardy because no penalty has been imposed by the European Commission or other relevant body in respect of the infringements.

Leniency

438. Lenaghan was granted a 35 per cent reduction in financial penalties as part of the OFT's leniency programme. Lenaghan's financial penalty is therefore reduced to £19,245.

vii. Conclusion on penalties

439. In conclusion, the OFT has, pursuant to section 36(1) of the Act, imposed financial penalties on the Parties as summarised in the table below:

Party	Penalty calculated at the end of Step 5	Penalty to be paid
Briggs	£57,120	£0 ³⁹⁹
Pirie	£114,873	£51,693 ⁴⁰⁰
Walker	£29,845	£16,415 ⁴⁰¹
Lenaghan	£29,607	£19,245 ⁴⁰²
TOTAL	£231,445	£87,353

viii. Payment of penalty

440. All Parties must pay their respective penalties by close of banking business on 31 May 2005. If any of the Parties fails to pay the penalty within the deadline specified above, and has not brought an appeal against the imposition or amount of the penalty within the time allowed or such an

³⁹⁸ *Ibid.*, at paragraph 2.18.

³⁹⁹ As noted at paragraph 394 above, Briggs' financial penalty was reduced to zero because it was granted total immunity.

⁴⁰⁰ As noted at paragraph 410 above, Pirie's financial penalty was reduced by 55 per cent (which includes an uplift for leniency plus). See 'the 'OFT's guidance as to the appropriate amount of a penalty' (December 2004).

⁴⁰¹ As noted at paragraph 424 above, Walker's financial penalty was reduced by 45 per cent because it was granted leniency.

⁴⁰² As noted at paragraph 438 above, Lenaghan's financial penalty was reduced by 35 per cent because it was granted leniency.

appeal has been made and determined, the OFT can commence proceedings to recover the required amount as a civil debt.